

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 23-10063-shl

4 Adv. Case No. 23-01192-shl

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6 In the Matter of:

7
8 GENESIS GLOBAL HOLDCO, LLC,

9
10 Debtor.

11 - - - - - x

12 GEMINI TRUST COMPANY, LLC,

13 Plaintiff,

14 v.

15 GENESIS GLOBAL CAPITAL, LLC et al.,

16 Defendants.

17 - - - - - x

18
19 United States Bankruptcy Court

20 300 Quarropas Street, Room 248

21 White Plains, NY 10601

22
23 January 18, 2024

24 10:12 AM

25

1 B E F O R E :

2 HON SEAN H. LANE

3 U.S. BANKRUPTCY JUDGE

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5 ECRO: ANA VARGAS

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1 HEARING re Omnibus Hearing

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3 HEARING re Doc. #1161 Notice of Agenda

4

5 HEARING re Discovery Conference Requested By Attorney Eric

6 Medina

7

8 HEARING re Doc. #1104 Motion To Approve Compromise/ Debtor's

9 Motion For Entry Of An Order Approving A Settlement

10 Agreement By And Among Genesis Global Capital And

11 Moonalpha Financial Service Limited

12

13 HEARING re Doc. #995 [REDACTED] Debtor's Fourth Omnibus

14 Objection To Certain Claims

15 (Duplicate, Amended, No Liability) (Non-Substantive)

16

17 HEARING re Doc. #1058 [REDACTED] Debtor's Fifteenth Omnibus

18 Objection To Certain Claims

19 (Non-Substantive) (Duplicate)

20

21 HEARING re Doc. #1059 [REDACTED] Debtor's Sixteenth Omnibus

22 Objection To Certain Claims

23 (Non-Substantive) (No Liability)

24

25

1 HEARING re Doc. #1060 [REDACTED] Debtor's Seventeenth
2 Omnibus Objection To Certain
3 Claims (Non-Substantive) (No Liability)
4

5 HEARING re Adversary proceeding: 23-01 192-shl Gemini Trust
6 Company, LLC v. Genesis Global Capital, LLC et al

7 ***In Person Hearing For Adversary 23-1192***
8

9 HEARING re Adversary proceeding: 23-01192-shl Gemini Trust
10 Company, LLC v. Genesis Global Capital, LLC et al

11 ***In Person Hearing***Doc. #13 Scheduling And Pre-Trial
12 Order
13

14 HEARING re Adversary proceeding: 23-01192-shl Gemini Trust
15 Company, LLC v. Genesis Global Capital, LLC et al

16 In Person Hearing***Doc. #9 Motion To Dismiss Counts II,
17 III, and IV of The Complaint
18

19 HEARING re Adversary proceeding: 23-01192-shl Gemini Trust
20 Company, LLC v. Genesis Global Capital, LLC et al

21 ***In Person Hearing***Doc. #15 Motion To Dismiss Adversary
22 Proceeding / Gemini Trust Company, LLC's Motion To Dismiss
23 Counterclaims IV And VI In Their Entirety And Counterclaim
24 VII Insofar As It Pertains To The Additional Collateral
25

1 HEARING re Adversary proceeding: 23-01192-shl Gemini Trust
2 Company, LLC v. Genesis Global Capital, LLC et al
3 ***In Person Hearing***Doc. #16 Memorandum Of Law In Support
4 Of Gemini Trust Company, LLC's Motion To Dismiss
5 Counterclaims IV And VI In Their Entirety And Counterclaim
6 VII Insofar As It Pertains To The Additional Collateral
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Transcribed by: Sonya Ledanski Hyde

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13 OLIVER BAKES
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18 BRIAN BULTHUIS
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16 AKIKO MATSUDA
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1 P R O C E E D I N G S

2 CLERK: All rise.

3 THE COURT: Good morning. Please be seated.

4 AUTOMATED VOICE: Recording in progress.

5 THE COURT: Yeah, please. Good morning. This is
6 Judge Sean Lane in the United States Bankruptcy Court for
7 the Southern District of New York, and we're here this
8 morning for a hearing in Genesis Global Holdco, and we'll
9 start as we always do with appearances, and I'll start first
10 with the folks who are here in the courtroom and then get
11 any other appearances for folks who are on Zoom.

12 So, starting in the courtroom, let me get the
13 appearances from Debtor's counsel.

14 MR. BAREFOOD: Good morning. Your Honor, Luke
15 Barefoot from Cleary Gottlieb Steen & Hamilton for the
16 Debtors. I'm joined by my colleagues, Ms. Fike, Mr. Massey,
17 and Mr. Lenox.

18 THE COURT: All right, good morning. And let me
19 find out who is here on behalf of Gemini.

20 MR. BURKE: Good morning, Your Honor. Donald
21 Burke, Willkie Farr & Gallagher for Gemini Trust Company.
22 I'm joined by Carl Mills from Hughes Hubbard & Reed as well.

23 THE COURT: All right, good morning. And on
24 behalf of the official committee?

25 MR. WEST: Good morning, Your Honor. Colin West

1 of White & Case on behalf of the Official Committee of
2 Unsecured Creditors.

3 THE COURT: All right, good morning. And let me
4 ask if there's anyone else in court who wants or needs to
5 make an appearance? And what I would ask is we have
6 different kinds of microphones, and I apologize if I've
7 bored you with this speech before. These are the ones to
8 amplify in the room. These are the ones to amplify for
9 purposes of Zoom.

10 So, you sort of need to get close to one or both.
11 This is a little (indiscernible) exciting. Sorry for the
12 folks who are on Zoom who are hearing some noise. But any
13 other appearances?

14 MR. HOLLEMBEAK: Yes, Your Honor. Am I --

15 THE COURT: Yeah, at least -- yeah, just make sure
16 to get close to that microphone.

17 MR. HOLLEMBEAK: Yes. Jeremy Hollembeak from the
18 law firm of Baird Holm. I represent two related parties who
19 are claimants that asserted proof of claim 402 and 405
20 that's a matter on the agenda today --

21 THE COURT: All right.

22 MR. HOLLEMBEAK: -- regarding -- they've been
23 objected to.

24 THE COURT: All right. Thank you very much. Any
25 other parties who are here in the courtroom who wish to make

1 an appearance at this time?

2 All right. So, let me turn to the folks on Zoom
3 and find out who is here, who wishes to make an appearance.
4 So, we'll start if there's anyone from the Debtors who wants
5 to make an appearance?

6 MS. VANLARE: Good morning, Your Honor. Jane
7 Vanlare, Cleary Gottlieb Steen & Hamilton on behalf of the
8 Debtors, and I'm joined by my colleague, Ms. Hoo Ri Kim.

9 THE COURT: All right, good morning. And I
10 believe I see someone from the ad hoc group. Let me get
11 that appearance.

12 MR. ROSEN: Yes, Your Honor. Brian Rosen,
13 Proskauer Rose on behalf of the ad hoc group, and I'm joined
14 by my colleague also on Zoom, Mr. Will Dalsen.

15 THE COURT: All right, good morning. And I
16 believe we have the declarant for the Debtor is also on. I
17 believe I see Mr. Kinealy, so let me get his appearance.

18 MR. KINEALY: Yes, Your Honor. Paul Kinealy from
19 Alvarez & Marsal on behalf of the Debtor.

20 THE COURT: All right, good morning. Happy to
21 have you. I also believe I see Mr. Medina who is -- has a
22 discovery issue. So, Mr. Medina, let me get your
23 appearance.

24 MR. MEDINA: Good morning, Your Honor. Eric
25 Medina on behalf of BAO Family Holdings.

1 THE COURT: All right, good morning. And with
2 that, I will throw it open to any other party who wishes to
3 make an appearance. I'll do that just because we have a
4 very lengthy list of folks who are here, and I don't think
5 we want to go through the entire list as many folks are here
6 for listen only.

7 Anyone else on Zoom who would like to make an
8 appearance? All right. Going once, going twice. All
9 right. And obviously, if that changes at any point, people
10 can identify themselves if they need to speak.

11 So, with that, I will turn it over to Debtor's
12 counsel here in the room as I -- sort of my -- I have the
13 agenda which is obviously very helpful. Thank you for that.
14 I -- so, Mr. Barefoot?

15 MR. BAREFOOT: Good morning, Your Honor. Luke
16 Barefoot from Cleary Gottlieb for the Debtors. As you know,
17 we --

18 THE COURT: All right. Let me just interrupt for
19 one second. Everybody on Zoom hear Mr. Barefoot? All
20 right, great. Thank you.

21 MAN: Yes.

22 THE COURT: I just want to check.

23 MR. BAREFOOT: Your Honor, we did file an amended
24 agenda at Docket Item 1161. It has a number of uncontested
25 matters, and then we'll get to the Gemini adversary

1 proceeding.

2 Just in terms of the order of operations,
3 subsequent to filing of that agenda, pursuant to discussions
4 with your chambers, we scheduled the added -- we'll add to
5 the agenda the BAO Family Holdings plan confirmation
6 discovery dispute and subject to Your Honor's preferences
7 would propose to slot that in at the end of the uncontested
8 matters before Gemini.

9 THE COURT: All right, that sounds great. So,
10 take it away.

11 MR. BAREFOOT: Your Honor, I'll turn the first
12 matter over to my colleague, Ms. Kim, to present.

13 THE COURT: All right, Ms. Kim.

14 MS. KIM: Good morning, Your Honor. Can you hear
15 me well?

16 THE COURT: I can hear you just fine. Thank you.

17 MS. KIM: Great. For the record, Hoo Ri Kim,
18 Cleary Gottlieb Steen & Hamilton on behalf of the Debtors.
19 I'll be presenting the Moonalpha settlement motion which was
20 filed at Docket Item 1104. By this motion, the Debtors seek
21 authorization for entry into a Settlement Agreement and
22 performance under that agreement with Moonalpha Financial
23 Services Limited.

24 First, Your Honor, we would like to move into
25 evidence the declaration of Mr. Derar Islim, who is the

1 interim Chief Executive Officer of Genesis Global Holdco in
2 support of this motion. That declaration was attached to
3 the settlement motion, and Mr. Islim is present on Zoom to
4 answer any questions.

5 THE COURT: All right. Thank you. Anybody wish
6 to be heard as to the request to receive that declaration
7 into evidence? All right. Hearing no response, I'm happy
8 to receive it for purposes of today's hearing.

9 MS. KIM: Thanks, Your Honor. Turning to the
10 request to enter into the settlement, the Debtors have been
11 engaging in negotiations with Moonalpha with respect to
12 certain loan agreements between Moonalpha and the Debtor,
13 Genesis Global Capital. We'd note that Moonalpha is going
14 through its own restructuring process in Singapore with
15 certain of its affiliates as well.

16 The proposed settlement resolves those claims with
17 respect to the loan agreements and related collateral posted
18 by each party resulting in a single claim by GGC in the
19 amount of \$184.8 million against Moonalpha. The special
20 committee has determined and the Debtors submit that the
21 settlement is in the best interest of the Debtor's estates,
22 their creditors, and is well within the range of
23 reasonableness.

24 If I may, I'll briefly touch on some of the
25 reasons described in the motion in support. First, the

1 Settlement Agreement will result in GGC having no
2 outstanding amounts payable to Moonalpha and results in a
3 net claim for GGC. This avoids the unnecessary risk of a
4 potential litigation with respect to these claims, which
5 could be lengthy and costly. Not only that, but there are
6 also additional litigation risks related to any potential
7 litigation, including the uncertainty of any -- litigating
8 any issues in Singapore, the effects of Moonalpha's
9 restructuring, and any applicable law with respect to any
10 litigation with respect to the claims.

11 The Settlement Agreement represents significant
12 efforts from both parties and their sophisticated advisors
13 to reconcile their outstanding claims against one another
14 and would fully and finally resolve these claims under the
15 agreements without the need to divert the Debtor's adviser's
16 attention from other matters loaded in these Chapter 11
17 cases.

18 So, Debtors and Moonalpha are also entitled to a
19 mutual set-off of the claims arising out of their pre-
20 petition agreements, which are both governed by New York law
21 and are as between the same parties in the same capacities
22 as lender or borrower.

23 Relief from the stay to effectuate the set-off is
24 appropriate for the resolution of the sizable mutual claims
25 between the parties which results in a benefit to the

1 estate.

2 For these reasons, and following extensive arms'-
3 length negotiations, the special committee of the Debtors
4 has in its business judgment approved the settlement. We'd
5 also note that there were no objections or responses filed
6 with respect to the motion, and accordingly, the Debtors
7 request the entry of the order unless Your Honor has any
8 questions.

9 THE COURT: All right. Thank you very much. Let
10 me ask if the committee -- the official committee wishes to
11 be heard on this settlement?

12 MR. WEST: No, Your Honor, we don't. We don't
13 object or have any other comments.

14 THE COURT: All right, thank you very much. Let
15 me solicit any other responses from any other party who
16 wishes to be heard in the settlement.

17 All right, Ms. Kim. I just had one question,
18 which is that you talked about the set-off and the ultimate
19 sort of net benefit to the estate, and I saw the different
20 amounts that are being set off, some in dollars and some in
21 cryptocurrency. Do you -- you can give me a sense just for
22 the record of what the net benefit is to the estate in terms
23 of the set-offs?

24 MS. KIM: Yes, Your Honor. So, in terms of how we
25 got to the set-off amount, there are various amounts at

1 issue that are denominated in different digital assets, and
2 given the backdrop of the fluctuations in prices of these
3 various digital assets, the Debtors and Moonalpha have
4 agreed to calculate these amounts using a volume-weighted
5 average price for a certain period of time. So, that's how
6 we -- and including for the outstanding principal amount and
7 how the collateral was priced during that period as well.

8 And so, that resulted in the number that's -- the
9 final number of the claim, which is 184.4 million U.S.
10 dollars, and that essentially is a claim that GGC has
11 asserted in Moonalpha's restructuring process, and under
12 their scheme, which is the equivalent of (indiscernible) as
13 I understand, GGC will get to choose the form of recovery
14 for that claim amount.

15 And so, that's the claim amount on its face, but
16 the recovery will not necessarily be that entire amount, if
17 that makes sense.

18 THE COURT: Yeah, that makes sense. Do you have
19 any sense of what the proposed recovery percentage would be
20 based on the current scheme?

21 MS. KIM: Yes, Your Honor. So, the creditors get
22 to choose whether to receive their recoveries in
23 (indiscernible) recovery coins, which is a new
24 cryptocurrency that (indiscernible) and Moonalpha Debtors
25 are proposing to issue, or an equity like CVR instrument

1 that's tied to the performance of certain assets, and I
2 believe that the recovery ranges that we've received from
3 their presentation is around -- is between 0 to 20 percent.

4 THE COURT: All right. Thank you very much. All
5 right. Anything else, Ms. Kim?

6 MS. KIM: No, that's all, Your Honor.

7 THE COURT: All right. Thank you. Anything else
8 from any other party? Hearing nothing further and seeing no
9 objection on the docket, and for all the reasons you set
10 forth in your motion and Ms. Kim has explained on the
11 record, I'm happy to approve the settlement as consistent
12 with Rule 9019 and applicable case law under that rule and
13 find that the settlement here is in the best interest of the
14 estate, and find again in the vaguely pejorative way it's
15 sometimes phrased that it is -- doesn't fall below the
16 lowest point in the range of reasonableness and in fact is a
17 reasonable settlement for all the reasons and all the
18 factors -- when you consider all the factors set forth under
19 the 2nd Circuit in evaluating a settlement that are all set
20 forth and evaluated in detail in the motion.

21 So, that is granted. Thank you very much, Ms.
22 Kim.

23 MS. KIM: Thank you, Your Honor. I'll turn it
24 back to the courtroom.

25 THE COURT: All right.

1 MR. LENOX: Good morning, Your Honor. Brad Lenox
2 of Cleary Gottlieb for the Debtors.

3 THE COURT: Good morning.

4 MR. LENOX: I will be addressing the second item
5 on the uncontested portion of today's agenda, which are the
6 no books and records claims initially identified on Exhibit
7 4 to the proposed order for the Debtor's fourth omnibus
8 claims objection, which was filed at ECF No. 995.

9 As Your Honor will recall following a colloquy at
10 the January 3rd hearing, the Debtors had adjourned
11 resolution of these no books and records claims in order to
12 provide further information that Your Honor had requested
13 with respect to what documentation, if any, had been
14 submitted by the affected claimants in support of the
15 disputed claims.

16 On January 12th, the Debtors filed a supplemental
17 declaration of Paul Kinealy of Alvarez & Marsal, the
18 Debtor's financial advisor, at ECF No. 1152. This
19 supplemental declaration provides further analysis of the no
20 books and records claims subject to the fourth omnibus
21 claims objection as well as separate claims subject to the
22 17th omnibus claims objection, which is also on today's
23 agenda as Item No. 5.

24 Given that this supplemental declaration involves
25 two separate agenda items, if Your Honor is amenable, I

1 would propose briefly discussing the supplemental
2 declaration first and then proceeding to the relief
3 requested on the fourth and 17th omnibus claims objections.

4 THE COURT: Please. Makes a lot of sense.

5 MR. LENOX: Thank you. As a housekeeping matter,
6 the Debtors move to introduce into evidence Mr. Kinealy's
7 supplemental declaration, which again is filed at ECF No.
8 1152 in further support of the Debtor's fourth and 17th
9 omnibus claims objections.

10 THE COURT: All right. Anyone wish to be heard on
11 that request? Hearing no response, I am happy to receive
12 it. I will say it's incredibly helpful.

13 MR. LENOX: Thank you, Your Honor. As explained
14 in Mr. Kinealy's declaration, for the vast majority of the
15 no books and records claims subject to the fourth omnibus
16 objection and the no liability claims subject to the 17th
17 omnibus objection, the affected claimants did not provide
18 any supporting information or documentation whatsoever to
19 identify the basis for their asserted liabilities, which
20 liabilities are also not reflected in the Debtors books and
21 records.

22 There were, however, two no books and records
23 claims and three no liability claims that did include some
24 form of supporting material although in all cases none of
25 that material identifies any relationship with any of the

1 Debtors or any alleged liabilities owed by the Debtors.
2 Copies of those five claims have been provided to Your Honor
3 in unredacted form and are also described in detail in the
4 supplemental declaration.

5 Walking through each of these five claims briefly,
6 Claim No. 542 includes as support only an additional version
7 of the proof of claim itself. Claim No. 803 includes only
8 screenshots of a medical portal containing various personal
9 medical information, which the Debtors believe is related to
10 the separate Chapter 11 Proceeding of Genesis Care, an
11 entity that is unrelated to the Debtors.

12 Claims Nos. 213 and 291 each attach screenshots of
13 account statements that appear related to investments made
14 by the claimants with a platform called Donut, which is also
15 unrelated to the Debtors.

16 And finally, Claim No. 1199 includes a screenshot
17 of a pending balance of Bitcoin, but this screenshot does
18 not otherwise indicate where this balance is purported to be
19 held or otherwise reference the Debtors whatsoever.

20 Unless Your Honor has any questions with respect
21 to the information that was provided in this declaration, we
22 would request that Your Honor grant the relief requested
23 with respect to the no books and records claims subject to
24 the fourth omnibus claims objection.

25 All right. I'm happy -- well, let me ask if

1 anybody wishes to be heard on that request?

2 MR. ROSEN: Your Honor, this is Brian Rosen for a
3 moment. I just -- we're not appearing in connection with
4 this, but I just heard counsel refer to Donut. Donut is one
5 of the members of the ad hoc group that filed the claim. I
6 don't know the relationship of that particular claim that he
7 just referred to as with respect to Donut, but clearly it
8 does relate to the Genesis case, and I know counsel said it
9 did not. I would just ask that perhaps you remove that
10 claim for the moment and we have the ability to bring this
11 up to the Donut person involved in the case.

12 THE COURT: Can you give me a sense of how Donut
13 is involved? Is it a platform through which people invested
14 in Genesis? Because there's this -- I do have a statement
15 saying that they're not involved with the Debtors, so that's
16 why I ask.

17 MR. ROSEN: Donut is clearly a platform which I
18 think (indiscernible) millions of dollars or at least \$100
19 million were invested with the Debtors, yes.

20 THE COURT: All right. Well, let me ask Debtor's
21 counsel what you want to do in connection with Donut. I
22 know that there was a question of exactly how you would find
23 information relating to various platforms that -- which
24 individuals invested and whether the Debtor had the records
25 or the parties had the records. I know it can get a little

1 bit complicated. So, I don't know if you want to chat for a
2 second, however you want to handle it. And I think there
3 are -- some of these are clearly appropriate for -- to be
4 expunged, and I think Donut's mentioned in one or two. I'm
5 not sure, so.

6 MR. ROSEN: Yeah. Your Honor, I apologize. We're
7 not obviously appearing on behalf of that party that filed
8 the proof of claim. I would just ask if counsel could move
9 forward with the balance of the omnibus objection and
10 adjourn solely with respect to those Donut-related claims so
11 that someone could get involved on their behalf.

12 MR. LENOX: Your Honor, that's acceptable to the
13 Debtors. We'll adjourn the relief with respect to those two
14 claims.

15 THE COURT: All right. All right. Yeah, I think
16 it's 213 and 291?

17 MR. LENOX: Correct. And just to clarify for the
18 record, Your Honor, my reference was intended to convey that
19 Donut is not a Debtor entity or --

20 THE COURT: Yeah. No, I totally get it. Although
21 it does say -- the supporting documentation doesn't indicate
22 a relationship with the Debtors, yeah, I guess that's right.
23 That's fine. I don't know if you want to also take a look
24 at 1199. That one -- although I guess that's a services
25 performed as opposed to digital assets held, right, so

1 that's not in the same bucket. So, I guess it would just be
2 those two.

3 All right. Anybody else wish to be heard? All
4 right, I'm happy to grant the request as just been amended
5 for relief as to the no books and records, and so we would
6 carve out Claim 213 and 291, which are identified as digital
7 assets loaned to the Debtors in connection with the Donut
8 platform, which may or may not have anything to do with the
9 Debtors, but we'll take a look and see what's what, but it's
10 granted as to everything else.

11 And I will say I very much appreciate the
12 thoroughness of the declaration as well as providing the
13 attachments. Sometimes seeing a claim, a picture is worth a
14 thousand words in terms of say the description of the
15 Genesis Healthcare entity and seeing what the claim looks
16 like. You can clearly tell it's not meant to be filed in
17 this case, because it really has nothing to do with what
18 this case is about.

19 So, that is granted, and I know that Mr. Kinealy's
20 declaration was also provided in connection with the 17th
21 omnibus objection. So, maybe we'll turn to that. If
22 there's anything else you wanted to add to that or just
23 request relief on that one?

24 MR. LENOX: No, Your Honor. Just to clarify based
25 on the prior discussion, Claim Nos. 213 and 291 are actually

1 subject to the 17th omnibus objection.

2 THE COURT: All right, got you.

3 MR. LENOX: Not the fourth. So, then just for the
4 record --

5 THE COURT: Yeah, you covered everything Mr.
6 Kinealy addressed in both declarations --

7 MR. LENOX: Correct, yeah, I did that
8 simultaneously.

9 THE COURT: -- both objections. All right.

10 MR. LENOX: So, we will -- just again for one
11 other clarification, we will submit the revised proposed
12 order with respect to the fourth omnibus claims objection,
13 which will also not include Claim No. 1132, which we
14 subsequently withdrew the objection --

15 THE COURT: All right.

16 MR. LENOX: -- with respect thereto.

17 THE COURT: All right, and I am happy to grant the
18 requested relief as has been amended as to the other
19 declaration -- I'm sorry, as to the other objection for
20 which Mr. Kinealy provided a declaration that is the 17th
21 subject to the carve-out we just discussed for all the
22 reasons that we have discussed and put on the record.

23 And again, I appreciate it, and providing the
24 claims and breaking it down the way you did in terms of
25 which ones don't have supporting documentation and which

1 ones do and why those are relevant or not relevant is very
2 helpful. So, thank you for the effort.

3 MR. LENOX: You're welcome, Your Honor. And just
4 one final housekeeping matter, we just wanted to note that
5 the orders for the third through the 14th omnibus objection,
6 which were granted orally by Your Honor at the January 3rd
7 hearing, have not yet been entered. And so, we would
8 respectfully request that Your Honor do so as soon as
9 convenient.

10 THE COURT: All right. I think they're close to
11 being in process. I looked at them yesterday. So, thank
12 you very much.

13 MR. LENOX: Thank you, Your Honor.

14 THE COURT: And in granting the relief, I'm
15 applying the same standards that I think I set forth in more
16 detail at the last hearing and will not bore you all with
17 another recitation of the shifting burdens on claim
18 objections, as exciting as that is.

19 So, moving on.

20 MR. LENOX: Thank you, Your Honor. I will cede
21 the podium to my colleague, Ms. Fike.

22 THE COURT: All right. Thank you.

23 MS. FIKE: Good morning, Your Honor. Deandra Fike
24 of Cleary Gottlieb on behalf of the Debtors.

25 THE COURT: Good morning.

1 MS. FIKE: And I'll be presenting Items 3 and 4 on
2 the uncontested portion of the agenda which correspond to
3 the Debtors 15th and 16th omnibus objections, which are
4 filed at ECF No. 1058 and 1059 on the docket. And Your
5 Honor, if no objection as we did in the previous hearing,
6 given the overlap, I would propose to jointly present both
7 of the objections.

8 THE COURT: Makes perfect sense. Thank you.

9 MS. FIKE: Thank you, Your Honor. And as an
10 overview, these objections relate to claims that were
11 improperly asserted against multiple Debtors where only one
12 Debtor is potentially liable and claims that we've
13 identified as duplicates of the master claim filed by Gemini
14 Trust Company, LLC or Gemini.

15 And before moving forward, just as a housekeeping
16 matter, I would move to introduce into evidence the
17 declaration of Paul Kinealy, which is located at Exhibit B
18 to both of the omnibus objections.

19 THE COURT: All right. Anybody who wished to be
20 heard on that request? All right, I'm happy to receive it.
21 And again, I do appreciate Mr. Kinealy being here to answer
22 any questions, which was helpful the last time we got
23 together. Thank you very much, sir.

24 Counsel, proceed.

25 MS. FIKE: Thank you, Your Honor. And yes, he's

1 on the line if you have any questions. With respect to the
2 Debtor's 15th omnibus objection, the Debtors would object to
3 the claims on Exhibit 1 to the proposed order on the grounds
4 that they are duplicates of the master claim filed by Gemini
5 on behalf of the Gemini lenders pursuant to the authority
6 granted by this court in the bar date order.

7 The Debtors with the aid of their advisers
8 identified such Gemini duplicate claims based on a variety
9 of information including whether the claimant themselves
10 indicated that they were a Gemini lender in the proof of
11 claim, whether that be through supporting documentation or
12 through their specific answer to question eight on the proof
13 of claim form, or whether it be through informal exchanges
14 of information between the Debtors and Gemini. The Debtors
15 seek to disallow and expunge such claims to avoid improper
16 duplicate recoveries for the same claimant against the
17 Debtor's estates.

18 With respect to the 16th omnibus objection, the
19 Debtors object to the claims on Exhibit 1 to the proposed
20 orders on the grounds that the claims were improperly filed
21 against multiple Debtors where only a single Debtor is
22 potentially liable.

23 The Debtors objected to two of the master claims
24 filed by Gemini on behalf of their lenders against Genesis
25 Global Holdco, or Holdco, and Genesis Asia Pacific, or GAP,

1 preserving the Gemini master claim filed against Genesis
2 Global Capital or GGC. Similarly, we objected to two claims
3 filed by Gemini in its individual capacity against Holdco
4 and GAP, again preserving the claim against GGC.

5 For both the master claim filed on behalf of the
6 Genesis lenders as well as the claims filed in Gemini's
7 individual capacity, the claims as asserted against each of
8 the three Debtors are identical. The Debtors, with the aid
9 of their advisers, have identified that the liabilities
10 asserted in these duplicative claims are properly asserted
11 against GGC and that Gemini on behalf of its lenders or
12 itself does not have a business or otherwise relationship
13 with Holdco or GAP.

14 Neither Holdco nor GAP maintained a contractual or
15 business relationship with Gemini and Holdco itself did not
16 have any lending operations. In fact, Gemini makes no
17 allegations concerning transactions with Holdco or GAP in
18 either the Gemini master claims asserted on behalf of its
19 lenders or as part of the claims asserted in its individual
20 capacity, nor do they cite to any agreements or
21 communications with Holdco or GAP as there are none to cite
22 to.

23 If the claims against Holdco and GAP are not
24 disallowed, Gemini and its lenders may obtain double
25 recovery for the same alleged liability or recovery from the

1 incorrect Debtor.

2 The Debtors therefore seek disallowance of each of
3 the claims subject to the 16th omnibus objection to limit
4 Gemini to a single claim against the relevant Debtor's
5 estate arising from the same alleged liability.

6 And with that, unless Your Honor has any
7 questions, pursuant to Rule 3007 and the claims procedures
8 order, the Debtors request the claims listed on the exhibits
9 to the proposed orders for both the 15th and 16th omnibus
10 objections be disallowed in full and expunged from the
11 register.

12 THE COURT: All right, thank you very much. Let
13 me ask if Gemini wishes to be heard on these objections.

14 MR. BURKE: We do not, Your Honor.

15 THE COURT: All right. Thank you very much. Any
16 other party that might wish to be heard? Hearing no
17 response, and based on the presentation here today as well
18 as the evidence submitted in support of the claim,
19 objections for the 15th and 16th omnibus claim objections,
20 I'm happy to grant the requested relief. I find again
21 applying the shifting burdens of claim objections that are
22 the -- set forth in more detail at the last hearing that
23 you've satisfied the basis for getting relief, and I note
24 it's not objected to, and I appreciate the cooperation and
25 obvious consultation that's gone on between the Debtors and

1 Gemini in order to sort of (indiscernible) and get an
2 accurate claims register dealing with the Earned users and
3 folks who are associated with Gemini.

4 So, I'm happy to grant your objection for the
5 duplicate claims as well as for the claims that are asserted
6 against Holdco and GAP that should be asserted against GGC,
7 and that claim -- those claims against GC are unaffected.

8 So, thank you very much.

9 MS. FIKE: Thank you, Your Honor.

10 THE COURT: And I appreciate seeing some young
11 lawyers in person in court. It's a wonderful thing. So, I
12 -- it's great to see you and look forward to seeing you both
13 in the future.

14 MS. FIKE: Thank you very much, Your Honor, and
15 you will see my colleague, Brad Lenox, again very shortly --

16 THE COURT: Oh, well, sooner than --

17 MS. FIKE: -- and be dealing with a small
18 (indiscernible) matter.

19 THE COURT: -- I may have anticipated. Great.
20 All right. Thanks so much.

21 MR. LENOX: Thank you, Your Honor. Again, for the
22 record, Brad Lennox of Cleary Gottlieb for the Debtors.
23 Before returning to the remainder of today's agenda, we
24 wanted to briefly address the forthcoming dates for which
25 the Debtors have scheduled certain other claims-related

1 matters.

2 As Your Honor is aware, the Debtors have noticed
3 for February 8th two additional omnibus claims objections,
4 the 19th and the 20th omnibus claims objections which are
5 substantively similar to those presented to Your Honor today
6 and previously at the January 3rd hearing, and just to give
7 a sense of quantum, they involve a little over 50 claims in
8 total between the two.

9 And although the deadline has not passed for --
10 has not yet passed for objections, we expect them to proceed
11 on a largely if not a fully --

12 THE COURT: All right.

13 MR. LENOX: -- consensual basis. And based on
14 discussions with Your Honor's chambers, the Debtors were
15 also given a February 1st date for which the Debtors have
16 noticed --

17 THE COURT: Well, let me ask you about that. I'm
18 trying to keep my calendar as manageable as possible. So, I
19 think when we talked about the 8th, I didn't know there was
20 the first. It's the danger of talking to me as opposed to
21 Ms. Ebanks, who's the Zen master of all things scheduling.
22 I'm a little less accomplished.

23 So, my question for you all is whether we can put
24 everything on the 8th without doing any harm to anything
25 just in the interest of efficiency and obviously understand

1 -- and we all talked about this, a good idea to get -- have
2 a date for claims objections that we can work through, and
3 I'm happy to use the 8th so -- and the 8th using the later
4 date makes more sense than using the former, which it's
5 always harder to go backwards than to push things off a
6 little bit.

7 So, if it's all right with you, let's use the 8th
8 for everything, and we'll have all the claims objections on
9 the 8th and not have anything on the first.

10 MR. LENOX: Great. Thank you, Your Honor. That -
11 -

12 THE COURT: All right. Thank you very much.

13 MR. LENOX: -- that concludes that. And with
14 that, my colleague Jane Vanlare will be turning to the
15 discovery conference.

16 THE COURT: Okay, great. And I appreciate your
17 cooperation on that. And I know, counsel, you were
18 here, if I remember, a 402 and 405. As I understand it, if
19 I'm remembering correctly, those are the subjects of the 7th
20 omnibus objection. I think there was a notion about
21 adjourning that, but maybe it makes sense to hear from
22 Debtor's counsel as to what the status is of that, and I'm
23 happy to hear from you to the extent there's anything you
24 wanted to address.

25 MR. LENOX: Yes, Your Honor. So, with respect to

1 the 7th omnibus objection as it relates to Claims No. 402
2 and 405, we had originally requested an adjournment to the
3 February 1st date and then subsequently noticed that the
4 hearing date would be subject to a discussion with Your
5 Honor today.

6 So, if all right with Your Honor, we'll have that
7 as well as the other omnibus claims objection noticed for
8 the 1st moved to the eighth.

9 THE COURT: To the 8th, right.

10 MR. LENOX: Correct.

11 THE COURT: Is there anything since counsel's here
12 on 402 and 405, anything that you can share in terms of what
13 you're working through or -- also, there is a room back
14 there if you all wanted to chat about things, nothing -- a
15 lot of business can be done here in the courthouse since
16 we're actually in the courthouse.

17 Anything to offer counsel?

18 MR. LENOX: Nothing at this time, Your Honor. We
19 will be submitting a reply in response to the response that
20 was filed by counsel for the claimants but nothing at this
21 time that needs to be addressed.

22 THE COURT: All right. And when do you anticipate
23 doing that? I've lost track of scheduling. Just --

24 MR. LENOX: The deadline to do so is the 19th.

25 THE COURT: All right. The 19th. Anything else

1 on that? And I'm happy to hear from this gentleman if
2 there's anything particular he wanted to raise.

3 MR. LENOX: No, nothing, Your Honor. But before
4 turning it over to counsel, I -- we did also want to note
5 that we will need an additional hearing date in the end of
6 February or the beginning of March to resolve additional
7 claims.

8 THE COURT: Absolutely, I would anticipate that
9 you'll be working through other things. That's perfectly
10 fine.

11 So, before we get to Mr. Medina's discovery issue,
12 I don't know, Counsel, if that answers any of your
13 questions, but come on up if there's anything you wanted to
14 address.

15 MR. HOLLEMBEAK: Thank you, Your Honor. Again,
16 for the record, Jeremy Hollembeak of Baird Holm for
17 claimants asserting proof of claims 402 and 405.

18 I have no problem with coming back on February 8th
19 instead of February 1st. I did just want to say on the
20 record that my clients are concerned that we don't get this
21 resolved prior to a plan getting confirmed and initial
22 distributions being given out to allowed claims as long as
23 our claim is objected to in any portion, it's not allowed at
24 all for purposes of distribution, and even the disputed
25 portion is very significant.

1 So, it is important to us to move forward
2 expeditiously. And as I -- our response was Docket 1076.
3 It's a contractual issue. It may be something Your Honor
4 can decide as a matter of law, but if there's a
5 determination that there's ambiguity, we will need discovery
6 with respect to the dispute.

7 THE COURT: All right.

8 MR. HOLLEMBEAK: And you can see how that can take
9 time, so.

10 THE COURT: All right. Well, I appreciate the
11 preview, and we do have -- as you can tell by today's
12 agenda, there's a lot of things going on in the case, but it
13 sounds like we will get together February 8th and have a
14 discussion about it. I'll be fully briefed at that point.
15 I confess, I haven't read any of the papers on 402 and 405
16 yet, but I promise I will by the 8th and be ready to go, and
17 we'll see where we end up.

18 But I certainly understand your concerns, and
19 we'll have a discussion on the 8th about where things stand
20 and what the next steps are so that we'll have some clarity
21 going forward.

22 MR. HOLLEMBEAK: Thank you, Your Honor.

23 THE COURT: You're welcome. All right. With
24 that, I'll turn it over to Ms. Vanlare to start us off on
25 the discovery issue. And obviously, I see Mr. Medina on the

1 line. So, Ms. Vanlare, why don't you kick it off?

2 MS. VANLARE: Oh, jeez, Your Honor, I see I was
3 muted. Thanks very much, Your Honor. Jane Vanlare, Cleary
4 Gottlieb Steen & Hamilton on behalf of the Debtors.

5 Your Honor, I'll just say a few brief words and
6 then turn it over to Mr. Medina to articulate his concerns.
7 First, I'll just state, Your Honor, we have had multiple
8 conversations, meet and confers with Mr. Medina. We've told
9 him repeatedly that we remain open to hearing his concerns,
10 his issues, and are open to sharing information that is --
11 that we hope would facilitate resolution of whatever issues
12 his clients may have with respect to our plan.

13 To date, we have not heard articulated what his
14 objections may be to the plan. Our position is that
15 discovery should be tailored to the objections that he may
16 assert. That's the -- that's how the order approving the
17 disclosure statement and the related confirmation discovery
18 deadline (indiscernible) is framed.

19 Mr. Medina did not serve any discovery requests on
20 the Debtors on the deadline that is prescribed by the order.
21 Instead, what Mr. Medina has said is he would like all of
22 the discovery that's been produced in response to any and
23 all of the other objections. Again, we do not think that's
24 appropriate. We think that discovery should be tailored to
25 specific objections.

1 The Debtor served his client with discovery on the
2 deadline. Mr. Medina has not responded to a single document
3 request, to a single interrogatory, and has not told us when
4 his client may be available for a deposition.

5 Your Honor, we lack basic information with respect
6 to his client's claim such as amount or whether it's a
7 dollar claim or a crypto claim. Again, we remain open, and
8 as recently as on Sunday after Mr. Medina reached out to
9 Your Honor for a conference of which we were unaware, after
10 he did that we reached out to him again on Sunday with a
11 detailed list of responses to the points he had made in the
12 e-mail, again offering to point him to information, to
13 provide documents, to respond to questions he may have, and
14 again, I reiterate that we are -- we're here to respond to
15 questions that he may have.

16 As an example, you know, he said that he objects
17 to valuation. We pointed him to the coin reports, which the
18 Debtors file on a regular basis that denote the amounts of
19 dollars and digital assets that the Debtors have. So, I
20 just note that as an example. We've done that with other
21 documents as well.

22 There is also, I believe, another issue that he's
23 raised relating to redacted information. Of course, as Your
24 Honor is well aware, certain of the information that we
25 filed is redacted in accordance with Your Honor's redaction

1 order. We are again respectful of the wishes of the
2 creditors and of the court order. We are open to providing
3 confidential information as part of discovery where it is
4 tailored to a particular objection. Again, we have yet to
5 hear what the specific objections are or how the information
6 would be helpful.

7 Thank you very much, Your Honor.

8 THE COURT: All right. Thank you very -- one
9 question, Ms. Vanlare. Did you get a copy of the e-mail
10 that Mr. Medina sent to chambers requesting a discovery
11 conference?

12 MS. VANLARE: I did. There was one e-mail. I
13 don't know if -- but I did see the e-mail from Friday.

14 THE COURT: All right. So, Mr. Medina, what shall
15 we talk about?

16 MR. MEDINA: Thank you, Your Honor. Good morning.
17 This is Eric Medina for BAO Holdings.

18 MAN: (Indiscernible).

19 MR. MEDINA: Your Honor, can you hear me okay?

20 THE COURT: I can hear you fine.

21 MR. MEDINA: Thank you, Judge. So, Your Honor, I
22 just have to point out I heard everything Ms. Vanlare
23 indicated. I did speak with Ms. Vanlare a few times, and
24 I'm surprised to hear Ms. Vanlare's take on many of the
25 discussions that her and I had with regards to Your Honor's

1 confirmation protocols and the discovery regarding
2 confirmation.

3 Your Honor, on the 27th I sent a letter -- excuse
4 me. On the 15th, I sent a letter --

5 THE COURT: All right. In the interest of cutting
6 to the chase, what is it that you want, right? That's what
7 judges -- in terms of discovery, what is it that you're
8 looking for, for purposes of discovery, for confirmation?

9 MR. MEDINA: All right, Your Honor. So, we sent
10 her a letter indicating that we want information regarding
11 valuation. I indicated to Ms. Vanlare that it's the
12 Debtor's burden of proof with regards to the discovery that
13 would be served on our client. (Indiscernible) statement
14 that the Debtor -- Mr. -- excuse me (indiscernible) did not
15 respond to discovery, Your Honor, it's just not true. We've
16 actually provided objections --

17 THE COURT: No, no, again, I -- again, one of the
18 things about discovery is I know there's a long history of
19 back and forth, but what I do, which is I think consistent
20 with what all judges do, is the back and forth is fine up to
21 a certain point, but I don't have the bandwidth to get fully
22 involved in that. So, I'm really trying to be bottom line.
23 Nobody needs to defend their honor. Discovery disputes are
24 what they are. People make requests. People object and
25 people disagree, and then it comes to me.

1 So, when you say valuation, so Ms. Vanlare
2 mentioned certain reports that were provided. What is it
3 beyond that, that you want? Is there anything specifically
4 that you're looking for?

5 I -- well, let me first ask what your client --
6 who you represent in terms of the -- if it's an entity or
7 whether it's an individual, I don't need to hear the name
8 necessarily, but the -- what their holdings are so we can
9 have a sense of what is it that relates to your client.

10 There's obviously a lot of concerns about privacy.
11 There's already a decision that was issued when issues were
12 teed up. So, the idea of in a blunderbuss fashion providing
13 all discovery to you that was provided to others has an
14 obvious problem in terms of confidentiality in light of the
15 status of the case.

16 So, it really needs to be a bit more tailored than
17 that. So, what is it -- what are your client's interests in
18 the case?

19 MR. MEDINA: I agree. Thank you, Your Honor.
20 We're not looking for all the discovery. Our client holds a
21 little over \$2 million comprised of tokens in both Bitcoin
22 and Ethereum. Our client is an entity. We're looking for
23 information regarding valuation. There are a number of
24 (indiscernible) that were served by the DCG party, the --
25 excuse me, the DCG parties on the same date that discovery

1 was to be exchanged.

2 The information we're looking for is in connection
3 with discovery requests 1, 2, 4, 14, 15 and 25.

4 THE COURT: Well, I don't have that in front of
5 me, so I don't know what those numbers mean. You got to
6 tell me -- again, I'm just trying to get at the -- what is
7 it that you're -- there's specific documents or specific
8 things you would expect the Debtors to have other than what
9 Ms. Vanlare identified that you're looking for.

10 MR. MEDINA: Sure. Your Honor, the Debtor
11 identified Alvarez and Marsal as a witness on their amended
12 witness list for the confirmation hearing. In connection
13 with that witness list, Alvarez and Marsal is intending, I
14 suppose, to testify with regards to the data and assumptions
15 and the methodologies in calculating the recoveries, the
16 valuation methodologies for determining whether or not
17 claims are impaired, and the information concerning
18 (indiscernible) distribution principles and projected
19 recoveries.

20 There are a few other points by number that I
21 mention in the Alvarez and Marsal subpoena, Your Honor, but
22 that covers most of them. There's treatment of excess
23 assets that we wanted to see the documents on, and then
24 (indiscernible) documents related to inter-company
25 obligations.

1 THE COURT: Well, so let me ask. You mentioned a
2 list. What is that list in what document? Is that the
3 subpoena you referenced?

4 MR. MEDINA: Yes, Your Honor.

5 THE COURT: And --

6 MR. MEDINA: So, on the 27th, the --

7 THE COURT: Okay, go ahead.

8 MR. MEDINA: I'm sorry, Judge. On the 27th, the
9 DCG parties served -- I think they served about seven
10 subpoenas. We just filed a joinder. It's our intention to
11 just take information with regards to the valuation. And
12 the reason, Your Honor, I think the Court is aware, the plan
13 provides for (indiscernible) set forth in the plan
14 supplement a valuation of Bitcoin, for example, tokens as of
15 the petition date, where those numbers are I think roughly
16 double at today's values.

17 And when I look at the illustrative range of
18 recoveries, Your Honor, on the high range -- and that's --
19 for the Court's reference, it's document number 887, Page
20 263 of 273. On the high range of the distribution to
21 creditors in Class 7 under -- for GGC capital, the low range
22 of distribution indicated 73 percent to 100 percent recovery
23 at a hypothetical price of \$34,000.

24 At today's values, the low range of recoveries
25 would be --

1 THE COURT: No, I don't -- we don't -- I don't
2 need to get into that level of granularity. I just need to
3 find out what it is that you want to know. And so, what I
4 think you're saying --

5 MR. MEDINA: Sure.

6 THE COURT: -- is that you're piggybacking on some
7 other requests that were made and join in those requests on
8 -- as to valuation information. So, let me ask Ms. Vanlare
9 about that.

10 MS. VANLARE: Your Honor, again, I'm somewhat
11 puzzled by the word valuation beyond the information that
12 we've provided Mr. Medina, which we pointed him to publicly
13 file coin reports. So, when we're talking about the value
14 of assets, the value is what it is.

15 The plan obviously says what it says with respect
16 to how various claims are treated. The disclosure statement
17 hearing has a lot of disclosure as you know very well, Your
18 Honor, about the recoveries that are projected, the
19 assumptions that are underlying those. So, I am truly
20 puzzled as to what additional information Mr. Medina would
21 like to see.

22 THE COURT: Well, let me ask whether -- if you're
23 following Mr. Medina in referencing what was the request he
24 said was made by another party and certain specific numbers
25 in that request, whether it's a subpoena or discovery

1 request or a letter request, I have no idea, but if you're
2 following that, and if so, is that something the Debtors
3 were going to respond to and be willing to share their
4 response on those particular numerical items, whatever it
5 is, whether it's a reference to things that have already
6 been provided, whether it's a reference to publicly
7 available documents, whatever it is.

8 I may be misunderstanding that, but if I -- if
9 I've got it right, I guess that's one way to address the
10 issue.

11 MS. VANLARE: Your Honor, we --

12 MR. MEDINA: That's (indiscernible) Your Honor.

13 MS. VANLARE: -- we can certainly look, and I just
14 want to make sure, so this is with respect to DCG's
15 requests, and Mr. Medina would like documents in response to
16 1, 2, 4, 14, 15, and 25. That's what I wrote down. Is that
17 correct?

18 MS. MEDINA: Yes, Your Honor. For BAO, that's
19 correct, in connection with that subpoena. The other -- the
20 only other information, Your Honor, that we had sought, and
21 I'm aware of Your Honor's confidential --

22 THE COURT: Well, let me get -- let me run this
23 part to ground first before we go off topic. So, yeah. So,
24 I think you've got the numbers right, Ms. Vanlare, and I
25 don't -- again, I'm not in the weeds on this. So, I'm a bit

1 riffing in the dark, but I don't know if there's a Debtor
2 response to those or will be a Debtor response to those, and
3 if so, whether it's possible to give Mr. Medina whatever the
4 response is. And I'm not saying what the response is,
5 whatever the response is with appropriate redactions, if
6 necessary.

7 MS. VANLARE: We can certainly look at that. I do
8 note that, first of all, one of those requests asks -- is a
9 piggyback-type request that asks for everything else
10 everybody else has said, which again we are -- we've
11 uniformly said is not appropriate.

12 But other than that --

13 THE COURT: All right. Well, putting that one
14 aside.

15 MS. VANLARE: Putting that one aside, I think,
16 while it will present some challenges given, again, we've
17 had (indiscernible) meet and confers with other parties and
18 have -- we haven't necessarily done sort of searches in
19 relation -- in response to specific objections, we've done
20 kind of global, we can certainly take a look, Your Honor,
21 with respect to those specific requests and see if we can
22 produce in response to those.

23 THE COURT: All right. And obviously there may be
24 instances where that response has been narrowed down based
25 on certain conversations, and so my thought is whatever that

1 current response looks like, and if there are things that
2 are, for one reason or another, inappropriate to share with
3 Mr. Medina without redactions or otherwise, again, I don't
4 have the request in front of me, but I guess the idea would
5 be to follow form. He shouldn't end up in a better place
6 but end up in a similar place subject to confidentiality
7 concerns.

8 All right.

9 MS. VANLARE: Understood, Your Honor.

10 THE COURT: So, Mr. Medina, you mentioned one
11 other issue.

12 MR. MEDINA: Yes, Your Honor. It's one other
13 issue. Before -- the other issue is really -- it's pretty
14 straightforward. I just wanted to hopefully clarify, Your
15 Honor, with regards to confidentiality, I note that we did
16 provide an executed, signed document jumping onto Your
17 Honor's confidentiality order.

18 THE COURT: Well, but again, there's a decision
19 that's out there. And so, the idea would be if there are
20 customers that the Debtors have a relationship with and
21 there's information that would reveal their identity, and
22 they're not your clients, the thought would be to keep that
23 confidential in the same way it's being kept confidential in
24 the cases.

25 So, I don't know why discovery would change the

1 rules of what's contained in the decision that teed these
2 issues up in the first place. So, again, I am a bit
3 whistling in the dark, right, as -- so, as somebody who's
4 not on the ground on these issues and having been involved
5 in a lot of discovery in my former life, I recognize I'm
6 trying to lay out some general principles that are flexible
7 enough to be dealt with in the context of what's actually
8 going on.

9 So, that's why I'm referencing the opinion and
10 just trying to be sensitive to it without dictating exactly
11 what the outcome should be, because again, I don't know
12 enough. I could give you a more specific answer, but it's -
13 - would be throwing darts at a dartboard. So, I don't want
14 to do that.

15 So, what was the other issue you had?

16 MR. MEDINA: Your Honor -- thank you, Your Honor.
17 That's fair. With regards to the -- there was a planned
18 supplement filed on December the 29th. It's document number
19 117, and we were just trying to get -- with regards to the
20 redacted parties, there's a second half of a schedule that
21 was filed regarding the retained causes of action, and I had
22 asked Ms. Vanlare just for information to understand what
23 the value is, further information and whether or not those
24 redactions could be removed to understand what the value is
25 of those retained causes of action in connection with this

1 plan.

2 THE COURT: All right.

3 MAN: What's your Social Security Number?

4 THE COURT: Hold -- somebody's got an open line
5 that shouldn't, so please mute yourself unless somebody
6 reveal their Social Security Number for all the world, which
7 would be a bad thing.

8 So, Ms. Vanlare, any thoughts on that and not on
9 the social security question?

10 MS. VANLARE: So, Your Honor, the exhibit to the
11 planned supplement that Mr. Medina is referencing, as he
12 noted that the retained causes of action, the -- as I
13 understand it, I think Your Honor has been very clear about
14 the identities of the counter-party as to the expected value
15 of the claims. They are not broken down by party. What we
16 have in the -- obviously the disclosure statement, the
17 recovery analysis does make certain assumptions. So, I --
18 if the question whether we can provide the amount that we
19 are estimating for each of these causes of action; is that
20 the request?

21 MR. MEDINA: Yeah, that would -- that should do
22 it, and also whether or not any --

23 THE COURT: And to follow up on the earlier theme,
24 the idea, in the interest of efficiency, if there are
25 similar requests made by other parties that sort of follow

1 form with that, in other words, to the extent anybody else
2 is asked, and maybe there's conversations with the
3 committee, maybe there's conversations with some other
4 interested party, the idea would be if we can sort of fold
5 that -- Mr. Medina's concerns into those -- that process
6 that's already undergoing -- underway.

7 MS. VANLARE: Your Honor, I should note, nobody
8 else has asked for this information. I do think that
9 individual -- information with respect to an individual
10 cause of action I don't think is appropriate to provide.
11 That's covered by privilege. That would basically -- that's
12 asking --

13 THE COURT: Yeah, that's fair.

14 MS. VANLARE: -- you know, what we're getting to.
15 You know, to the extent he's looking for a total number,
16 again, we've carved out certain things out of -- there's
17 certain claims that are not included here, but if he's
18 looking for a total estimate, we can consider it. Again, I
19 do worry about the extent to which that information speaks
20 to the likelihood of success that the Debtors are
21 estimating, which is not --

22 THE COURT: Well, I understand that. And
23 certainly, I've had an occasion to talk to other parties in
24 other cases about that. It does implicate privilege issues,
25 and that's true even in cases where that's really the only

1 source of recovery for an unsecured creditor pool.

2 Here, that's clearly not the case. So, I would
3 suggest, Mr. Medina, sort of keeping your eyes on the prize,
4 meaning I think the recovery really is driven here by the
5 assets and the valuation of those assets.

6 This isn't really a case that's all about the
7 retained causes of action. I'm not trying to minimize them,
8 but that's really not the driver here. So, I think you
9 cited for your clients the range of recovery is estimated to
10 be 73 to 100 percent, so I don't think --

11 MR. MEDINA: No. I'm sorry. Excuse me, Your
12 Honor. I (indiscernible) 60 to 100.

13 THE COURT: Well, I don't think -- but up to 100
14 percent, and so, my -- again, my understanding is the
15 retained causes of actions aren't -- don't play the same
16 sort of central role here as they do in other cases.

17 So, again, I'm not saying they're not worthwhile,
18 but I don't know that they are of the same significance in
19 terms of understanding the plan, and perhaps it's just a
20 better course to find out what those retained causes of
21 action are to the extent that you have questions about that,
22 and what's not being essentially resolved by virtue of
23 agreements in -- between parties that are memorialized or
24 would be memorialized in the plan.

25 So, that might be a more valuable way to look at

1 it, but again, beyond that, I can't really offer much
2 guidance. It can be a little bit of a tricky issue, and
3 you'll have a discussion about it, and if there's still an
4 issue, we'll burn that bridge when we get to it, so.

5 MS. VANLARE: Your Honor, I'd just like to clarify
6 because I know a lot of people listen to these hearings, and
7 so, when we're talking about the retained causes of action
8 just now, it's the specific ones that are stated.

9 Obviously, there are significant retained causes
10 of action against the DCG parties, against Gemini. They are
11 not part of the schedule. They are, however, retained, and
12 there's significant disclosure with respect to those that's
13 separate and apart in the disclosure statement, again not
14 directly relevant to this discussion with Mr. Medina. I
15 just --

16 THE COURT: Well, no, it may be to the extent --

17 MS. VANLARE: I just want to make sure.

18 THE COURT: To the extent your -- that your answer
19 refers to parts of the disclosure statement or other things
20 that have already been made available that parties may not
21 be aware of, that certainly is relevant. But I'm sorry, I
22 cut you off. So, what was the last part of your question?

23 MS. VANLARE: Was that a question for me?

24 THE COURT: Yeah, I wasn't sure if there's
25 anything else you wanted me to respond to in your statement.

1 MS. VANLARE: Oh, no, I didn't have a question. I
2 just said I just wanted to clarify that in case there are
3 creditors on the line, I didn't want them to think that we -
4 - somehow those very significant causes of action are not
5 being retained or are not part of this. They absolutely
6 are. It's just that the specific questions that Mr. Medina
7 has are not with respect to those. They're with respect to
8 the ones that are listed.

9 THE COURT: All right, fair enough. All right.
10 With that, I think we probably accomplished all we can
11 accomplish. I trust you'll chat and see where you are, and
12 if the issue is not fully resolved, then you'll know where
13 to find me.

14 All right. Thank you very much.

15 MR. MEDINA: Thank you, Judge.

16 MAN: Thank you, Judge.

17 MS. VANLARE: Thank you.

18 THE COURT: And -- thank you. And with that, I'll
19 turn it back over to folks here in the courtroom. I think
20 we are up to the contested matters that are -- and the
21 adversary proceedings. That is the motion to dismiss that
22 was filed by the Debtors as well as Gemini Trust Company's
23 motion to dismiss counterclaims.

24 And so, I'm going to switch binders here for a
25 moment, and let me just make sure I have everything in front

1 of me that I need.

2 All right. With that, I'll turn it over to
3 Debtor's counsel.

4 MR. BAREFOOT: Thank you, Your Honor. Luke
5 Barefoot from Cleary Gottlieb for the Debtors. Your Honor,
6 we are now under agenda Items No. 1 and 2 under the
7 adversary proceeding portion of today's agenda, the dueling
8 motions to dismiss filed by the Debtors and by Gemini in
9 that adversary proceeding with respect to the claims and
10 certainly the counterclaims, all with respect to the
11 additional tranche of GBTC collateral.

12 THE COURT: Right.

13 MR. BAREFOOT: I am pleased to report that the
14 parties at least do agree on the proposed structure and
15 sequencing of argument today. So, subject to Your Honor's
16 preferences, what the parties would propose for the reasons
17 of judicial economy that we discussed in connection with the
18 scheduling order, and given the intertwined nature of the
19 claims and counter-claims, that rather than proceed on one
20 set of arguments with the motion to dismiss for the Debtors
21 and then kind of repeat some of that for the Gemini motion
22 to dismiss, what the parties have agreed is that for
23 efficiency we would make a combined presentation. The
24 Debtors will go first, you'll briefly hear from the
25 committee, and then Gemini will make its presentation, and

1 then the parties will reserve their rights on potential
2 rebuttal.

3 THE COURT: All right, I think that makes a lot of
4 sense. It always can be a little awkward both for briefing
5 and for argument when you have these kinds of cross
6 arguments on different counts and in different motions, but
7 we have the contractual issues and then we have the other
8 issues.

9 And so, that's the way I'm thinking of it rather
10 than thinking of it by motion, parsing it out by claim, not
11 that I won't do that when it comes time to write an opinion,
12 but please proceed.

13 MR. BAREFOOT: Okay. So, logistically, just --
14 Your Honor, then I'll first address the Debtor's motion to
15 dismiss Counts 2, 3, and 4 of Gemini's complaint, all
16 relating to the additional GBTC collateral, as well as
17 Gemini's motion to dismiss the Debtor's mirror declaratory
18 judgment action and preference claims with respect to the
19 additional collateral.

20 THE COURT: All right.

21 MR. BAREFOOT: My colleague, Mr. Massey, will then
22 briefly address the motions to dismiss the entirety of the
23 complaint as to GAP and Holdco, the other two Debtors.
24 You'll then, as I mentioned here from Mr. Shore on behalf of
25 the committee, which has intervened as an adversary, or as a

1 party in the adversary proceeding, and then we'll turn it
2 over to Gemini.

3 THE COURT: All right. And just to let folks
4 know, again being in your shoes in the past, you never quite
5 know how much time the bench has spent on things. I have my
6 little chart here of all the agreements. I've gone through
7 them more than once. And so, I have all the relevant
8 language, dates, little bullet points.

9 So, I say that so you can sort of skip the basic
10 level introduction. I know what the dispute is about, and
11 so you can cut to the chase, and my hope is that we'll have
12 a discussion.

13 And so, I will apologize in advance for cutting
14 you off to the extent I had -- have questions, and I know
15 that we will no doubt do violence to beautiful
16 presentations, you know, historic speeches that you would
17 give, but the idea is to make sure I sort of go through a
18 list of things that were on my mind, and again, I appreciate
19 everybody's flexibility that way, so.

20 MR. BAREFOOT: Very much appreciated, Your Honor.

21 THE COURT: Let's proceed.

22 MR. BAREFOOT: So, Your Honor, just to set the
23 stage a bit, we are proceeding somewhat unusually here with
24 an expedited briefing schedule and with discovery
25 simultaneously in advance of even obtaining a decision on

1 these motions to dismiss simply because of the magnitude and
2 importance of these claims for creditor recovery.

3 THE COURT: Right. And I understand these need to
4 be resolved before confirmation, and I don't see any reason
5 why that wouldn't happen. So, that's in my schedule baked
6 in. It will happen. We're, even before getting through all
7 the papers, working on a statement of facts. So, that's
8 completely understood, and I think we're all on the same
9 wavelength.

10 The other thing to the extent that it's relevant
11 to the parties, my thought is that this should be a written
12 decision, but to the extent that I reach a decision and
13 understand exactly what I intend on doing, but a decision
14 isn't ready yet, most of the time I'm unwilling to tell the
15 parties what I'm going to do until I actually finish, but
16 there are times when I say, no, I know what the answer is.

17 So, if that's helpful in terms of understanding
18 where things are, I'm happy to do that if I'm in a position
19 to do that. So, I'll keep that in mind. Again, I'm well
20 aware of the cash burn of extensive litigation on items as
21 important as this. So, I will endeavor to do that, if I
22 can. As I said, I can't always do that, but sometimes I
23 can. And so, we'll see where we are at the end of the
24 argument after I go back and think about it a bit more.

25 MR. BAREFOOT: Understood. Thank you, Your Honor.

1 So, before getting to the nitty gritty of each of the causes
2 of action that are the subject of motions to dismiss, the
3 Debtors would stipulate that Gemini has ably pled a breach
4 of contract claim. The problem is that that breach of
5 contract claim that they haven't actually brought doesn't
6 give them anything more than the same unsecured damages
7 claim that they have on their loan balances.

8 What they haven't pled and what they can't plead
9 is something more than that damages claim, whether it's a
10 secure -- an actual perfected security interest or a
11 constructive trust. The terms of the agreements and the
12 pleadings make clear that those causes of action fail.

13 First off, Your Honor, the dispute as to whether
14 they have a security interest can and should be resolved on
15 the bedrock definition of what is the scope of collateral.
16 The additional GBTC only became collateral upon transfer by
17 GGC, the pledgor, to the GTC account held in the name of
18 Gemini. That's crystal clear in the definition of
19 collateral, and the places that Gemini tries to point in
20 other areas of the agreement do nothing to undermine or
21 address that.

22 They do focus on, in the definition of collateral,
23 the for the benefit of language. That is ultimately
24 unavailing, because Gemini reads out of the agreement the
25 immediately preceding words, which is that it needs -- for

1 it to be collateral, it need -- it must not only be for the
2 benefit of Gemini, but it also has to be transferred by or
3 on behalf of the pledgor, which was GGC. As to the by GGC,
4 it's uncontested that GTC did not make the transfer that the
5 agreements required to the GTC account held in Gemini's
6 name.

7 Second --

8 THE COURT: Well, let me ask a very general
9 question here, right? So, as is often the case in contracts
10 one party's citing the precise language and somebody else is
11 citing the intent, and so, in citing the intent, there's
12 this notion that this is fundamentally unfair the way the
13 Debtors have read this. Everybody understood what was
14 supposed to happen and now here we are.

15 So, in addressing that fundamental fairness
16 question, what would you say, right? I think I understand
17 your papers are crystal clear on how you read the contract
18 language. And so -- and I think that this is something that
19 also bleeds into the constructive trust argument. So, it's
20 a very big picture point, but I'd be interested in your
21 views.

22 MR. BAREFOOT: Let me answer your question first
23 with respect to the claim for the issuance of a valid
24 security -- a pledge of the security.

25 THE COURT: Right.

1 MR. BAREFOOT: Whether something is unfair or
2 turned out in a way that smells like sour milk to someone is
3 honestly just irrelevant to the legal, technical question of
4 whether this agreement granted a valid security interest in
5 the additional GBTC. It's really just irrelevant to the
6 question.

7 As to the constructive trust claim, I think that
8 does go to the one element that maybe Gemini has validly
9 pled, which is whether there was unjust enrichment. My
10 answer, though, is that unjust enrichment is its own cause
11 of action, and there are no cases in either of the parties'
12 brief where -- briefs where a Court imposed a constructive
13 trust based solely on allegations of unjust enrichment.

14 There has to be more in terms of a confidential or
15 a fiduciary relationship, a transfer that was made by the
16 party that's claiming the constructive trust, and those
17 elements -- and the party also having a prior interest in
18 the goods or securities over which they're seeking a
19 constructive trust, and all of those elements are absent.

20 THE COURT: So, I guess asked another way, these
21 things seem to have happened over a fairly short period of
22 time. And so, while people note the dates, they don't
23 really necessarily talk about the timing in connection with
24 the understanding of how things actually happened, and I
25 don't know if there's anything worth commenting upon or

1 discussing in connection with that.

2 MR. BAREFOOT: I mean, Your Honor, I think the
3 facts concerning the sequencing and the transfer that was
4 contemplated to occur and simply did not really aren't in
5 dispute.

6 I think one thing that is important to note about
7 that, though, is we don't think you need to get to the
8 parties' intent. We think you can resolve this on the four
9 corners of the security agreement and the second amendment.
10 But if you want to look at intent, Gemini extensively pleads
11 in its complaint all the extensive efforts that it undertook
12 after the second amendment was signed before the petition
13 date to actually secure the transfer of the collateral to
14 its own account.

15 Those are extremely telling. If Gemini is correct
16 and actually believed that the moment DCG transferred the
17 GBTC collateral to GBC, that that created a valid security
18 interest and a valid pledge, there would be no reason for
19 them to have quite rightly followed up with the Debtors to
20 secure the second leg of the intended agreement.

21 So, in terms of just what Gemini itself alleges,
22 the party's conduct is inconsistent with a kind of after-
23 the-fact, manufactured claim that the transfer by GC to GGC
24 itself created the pledge.

25 THE COURT: All right. Thank you.

1 MR. BAREFOOT: But let me just go back Your Honor
2 to the for the benefit of language, because as always kind
3 of is the case when you read the briefing in the days before
4 argument, you wish you would have said something a little
5 bit more clearly.

6 Here, Gemini has not alleged anywhere in its
7 complaint that the transfer from DCG to GGC was made on
8 behalf of GGC, and let me just say that again, because in
9 the parties' briefing, we really focused on why a reading of
10 that transfer as being on behalf of GGC was nonsensical, but
11 there's a more threshold, basic point on which Your Honor
12 could rule, and that's that they have not alleged in their
13 complaint that the transfer from DCG to GGC was a transfer
14 made on behalf of the pledgor, and that is a required
15 element of the definition of collateral.

16 THE COURT: So, I understand this is in addition
17 to your other arguments about I think you have in your reply
18 (indiscernible) essentially nonsensical to transfer it for
19 the benefit of to the actual entity that it's supposedly for
20 the benefit of, but so you're saying that while you
21 discussed it that way in -- at some point in your papers,
22 they actually haven't pled it that -- in that matter.

23 MR. BAREFOOT: That's exactly right, Your Honor.

24 THE COURT: All right.

25 MR. BAREFOOT: They did plead the other element,

1 which is that the transfer was for the benefit of, and they
2 make some factual allegations about that, but there is
3 simply no allegations, much less facts, that would make it
4 plausible that a transfer from DCG to GGC was at the same
5 time a transfer on behalf of GGC.

6 And as Your Honor pointed out, and I think we can
7 rest on our papers on this, we do discuss extensively why
8 that reading, even if they had pledged it, would be somewhat
9 nonsensical.

10 THE COURT: All right.

11 MR. BAREFOOT: I also think, Your Honor, it's
12 going back to actually the question that you asked about
13 kind of the sequencing and the timing of this, I think it's
14 really important to keep in mind when we're reading this
15 that at the time the parties negotiated and executed the
16 second amendment, everyone absolutely understood exactly how
17 the flow of funds was going to operate.

18 This was not a generic agreement for any kinds of
19 future pledges. This was bespoke and done specifically with
20 the additional collateral, that it was contemplated and is
21 in the agreement that DCG will transfer to GGC, GGC will
22 transfer to Gemini.

23 So, if the parties had actually intended to rely
24 on the on behalf of or for the benefit of language in the
25 security agreement, they could have done that in a crystal-

1 clear way. They could have done it 10 different ways. They
2 didn't do anything to touch the definition of collateral in
3 the security agreement, and they incorporated that
4 definition into the second amendment, which means that until
5 and unless the securities were in the GTC account in
6 Gemini's name, they were not collateral.

7 Your Honor, just also addressing kind of a
8 mechanical issue, if you want to get to look outside of the
9 definition of collateral, it's very clear that there was no
10 mechanism in place for Gemini to actually exercise remedies
11 over the shares until they were in their possession.

12 So, if the parties had actually intended for the
13 pledge to become effective immediately upon the transfer to
14 GGC, for that to have any meaning, there would have had to
15 be some sort of a deposit account, control agreement, or
16 other mechanic in place to allow or enable Gemini to
17 actually enforce and foreclose on the collateral, because
18 otherwise all they have again is their unsecured contract
19 claim, and it's very telling, Your Honor, that the parties
20 in Section 2 of the Security Agreement actually amended the
21 remedies provision in the security agreement, and they did
22 nothing in amending that to put in place an enforcement
23 mechanism that would be effective any time other than Gemini
24 actually had possession of the securities as the agreement
25 contemplated.

1 So, I expect I might hear from the other side.
2 Well, that supports Gemini's view that there's got to be
3 some -- if there's an intent to pledge, an intent to protect
4 us, that there's got to be some kind of protection that
5 should exist until the actual transfer under the Debtor's
6 view. So, what would your response be to that?

7 MR. BAREFOOT: These are sophisticated parties who
8 knew what they were doing. There were a lot of parties in a
9 similar position who -- and it's not unique to this case
10 when you have an entity that's in distress, there's a
11 scramble for assets, a scramble to improve your position.

12 The fact that the Debtors didn't ultimately
13 perform, you have a breach of contract claim, you have your
14 loan claims, you don't have an entitlement to something that
15 the agreement doesn't provide.

16 THE COURT: No. Right. So, you're saying that
17 this is essentially a cryptocurrency version of what happens
18 in lots of cases that someone says, well, we're trying to
19 reach various agreements and we're going to try to protect
20 you in this way and keep things going, but as the ship
21 continues to sink, that we're not in a position to do that
22 and we end up in bankruptcy?

23 MR. BAREFOOT: And the petition intercedes, and
24 they have their -- they have claims under the contract.
25 They have claims under their loans, and they're going to

1 receive pretty generous recoveries under those. But what
2 they're not entitled to under the terms of this agreement is
3 to hog that security for themselves at the exclusion of all
4 other unsecured creditors.

5 And just to be clear, under our proposed
6 resolution of this issue, Gemini would share (indiscernible)
7 with other unsecured creditors in the distribution of the
8 additional GBTC collateral. It's just that they don't get
9 all of the additional GBTC collateral.

10 Your Honor, I think then I -- unless Your Honor
11 has other questions specific to the count on the issuance of
12 a pledge, I think I can turn at least from my perspective to
13 the property of the estate argument.

14 THE COURT: Please.

15 MR. BAREFOOT: So, this is squarely the --

16 THE COURT: Well, I do have one question --

17 MR. BAREFOOT: Sure.

18 THE COURT: -- which is they -- Gemini at one
19 point references a title, right, a title of a section as
20 opposed to the language of a section and says that that
21 title conveys a certain intent of the parties, and I think I
22 have your response to that, but anything that you wanted to
23 specifically mention?

24 MR. BAREFOOT: Is this in reference to Section 1
25 of the pledge agreement?

1 THE COURT: Yeah.

2 MR. BAREFOOT: So -- of the original security
3 agreement. Actually, one thing that I would like to add to
4 that is that Section 1 of the pledge agreement is not about
5 the additional GBTC. It's about the original GBTC that was
6 actually transferred in August of 2022.

7 So, to try to read an intent or infer something
8 from that section doesn't really make sense when we're
9 talking about a separate bucket of collateral.

10 THE COURT: All right.

11 MR. BAREFOOT: So, let me turn to the property of
12 the estate argument. Your Honor, from our perspective, this
13 is squarely foreclosed by the terms of the second amendment
14 which Gemini really fails to engage with in the briefing.

15 Section 1 of the second amendment makes expressly
16 clear that DCG was transferring "all right, title, and
17 interest in and to the additional collateral free and clear
18 of all liens, claims, and encumbrances," full stop.

19 So, this language has no limitation or caveat that
20 would suggest or provide that GGC somehow received or had as
21 of the petition date anything less than full legal and
22 equitable title. There's just no basis in the second
23 amendment to argue that GGC acquired some limited interest
24 in the additional collateral, and I think the cases that
25 Gemini cites, you know, some of which for example occur --

1 arose in the context of an escrow agreement really are
2 distinguishable and unavailing from a situation where you
3 have a full, clean transfer of title.

4 Gemini's property of the estate argument is also
5 internally inconsistent and self-defeating. If Gemini
6 didn't -- or excuse me -- if Genesis did not acquire full
7 legal title, it could not have pledged the additional GBTC
8 shares to Gemini and it could not have made the
9 representations concerning title free and clear that section
10 5B of the Security Agreement would have required.

11 That's all I wanted to say about constructive --
12 or about property of the estate, and I propose we move to
13 constructive trust.

14 THE COURT: Yeah, that would be fine. I just want
15 to make sure -- obviously I have the agreements because
16 they're attached to the complaint. So, you're saying the --
17 Section 1 of the Security Agreement entitled Transfer of
18 Collateral is referencing the transfer of the initial
19 collateral.

20 MR. BAREFOOT: Of the security, Your Honor.
21 That's correct.

22 THE COURT: Right. Yeah. All right.

23 MR. BAREFOOT: That's correct.

24 THE COURT: I just -- you said that, and I wanted
25 to make sure I connected all the dots looking -- having it

1 in front of you. So, thank you.

2 MR. BAREFOOT: So, Your Honor, turning to the
3 constructive trust argument, at the outset this is barred by
4 the existence of a valid contract between the parties. All
5 of the arguments you're hearing today are about our
6 competing interpretations of the agreements that govern the
7 additional GBTC collateral, and Gemini concedes that, as it
8 really must, this is a principle under New York law that
9 generally a -- the existence of an agreement forecloses a
10 constructive trust claim.

11 Its answer to that defense is mainly the
12 misstatement that they're not bound by the terms of the
13 second amendment because the Debtors are challenging its
14 validity.

15 The Debtors are doing no such thing. The Debtors
16 are putting forth their own interpretation of the second
17 amendment, but if you contrast what we did with the second
18 amendment with what we did with the first amendment, we are
19 challenging the first amendment. We brought a constructive
20 fraudulent conveyance claim with respect to the first
21 amendment.

22 We didn't bring any such claim with respect to the
23 second amendment and all of our arguments and our own
24 declaratory judgment action depend on the existence and
25 interpretation of the second amendment.

1 THE COURT: All right. To segue to a related
2 topic, the language is about nobody being a fiduciary for
3 anybody in connection with this, which you obviously cite
4 prominently. There's -- Gemini sort of tries to put some
5 guardrails around that, and what's your response to that?

6 MR. BAREFOOT: That's exactly where I was going to
7 go, Your Honor. Gemini's arguments on this are dancing on
8 the head of a pin at best. They're saying that the
9 disclaimer in the Master Loans Agreement of any of the
10 existence of any fiduciary relationship pertains to the
11 loans, Capital L Loans. It doesn't pertain to the Security
12 Agreement.

13 The Security Agreement incorporates all of the
14 defined terms from the Master Loan Agreement and the entire
15 purpose and intent of the Security Agreement is to secure
16 the obligations under the Capital L Loans, where the parties
17 in the Master Loan Agreement disclaimed a fiduciary
18 relationship.

19 THE COURT: Is there a place that you would have
20 me look in the agreements themselves that you think best
21 memorializes that proposition?

22 MR. BAREFOOT: I think it would be --

23 THE COURT: I mean, I'm looking at the -- I'm
24 looking at Exhibit 1, the complaint, and the -- which is the
25 Security Agreement, and there's a whereas clause which makes

1 -- the second whereas -- or the first whereas clause on the
2 first page makes reference to the Master Loan Agreements,
3 but -- and so, that's one place where I clearly saw it, and
4 it pops up in other places, but I was just curious to get
5 your take if there's anything that is particularly relevant
6 from your vantage point.

7 MR. BAREFOOT: Your Honor, I think it's also the
8 second warehouse clause, where it says that the Security
9 Agreement is entered into in consideration of transactions
10 under the Master Loan Agreements, and that the pledge is to
11 secure the pledgor's obligations under the Master Loan
12 Agreements.

13 There's not an express bring down, I would say, of
14 that representation that's made that there is no fiduciary
15 relationship, but the fact that the parties didn't restate
16 it doesn't nullify it, and given the close and intertwined
17 relationship between the Security Agreement and the Master
18 Loan Agreement, I think it applies to their constructive
19 trust.

20 THE COURT: And so are you saying -- I guess
21 there's two ways you could -- you view that, and maybe you
22 don't necessarily need to choose. One, you could say the
23 language bars this claim, or you could say if you're looking
24 at all the evidence, it essentially pushes it to one side if
25 you're -- well, we're not looking at evidence, but the idea

1 is if you're looking at the contract, you're trying to
2 understand the intent of the parties, there's that and there
3 isn't anything to contradict that.

4 MR. BAREFOOT: Exactly right, Your Honor.

5 THE COURT: All right.

6 MR. BAREFOOT: And the entire Security Agreement
7 makes no sense unless there are Capital L Loans outstanding.
8 The purpose is to secure the obligations under those loans.
9 So, to say that the representations made in the Master Loan
10 Agreement have no relevance to the Security Agreement is
11 kind of ignoring the context.

12 THE COURT: All right.

13 MR. BAREFOOT: Turning to kind of the third
14 argument under the constructive trust font, there was no
15 transfer of value from Gemini. All of the authorities that
16 we cited in our reply make clear that we don't think there
17 can be a constructive trust claim where Gemini didn't have
18 an interest in the property prior to the transfer. It was
19 DCG's property when it was transferred to the Debtors.
20 Gemini had no interest in the property prior to entry into
21 the second amendment to the security agreement.

22 THE COURT: All right. And getting back to I
23 think where you started, it sounds like it's your view that
24 if the argument is, well, there has to be some way to remedy
25 this wrong, your view is that's what the breach of contract

1 claim would be for.

2 MR. BAREFOOT: Correct, correct, which they
3 haven't brought, and I understand why. So, just finally,
4 Your Honor, on the constructive trust argument, there was no
5 unjust enrichment.

6 As I said, I think if you've pushed me to say
7 which of the factors of a constructive trust has Gemini
8 arguably pled, I think I'd say it was maybe unjust
9 enrichment, but New York law is unequivocal that a
10 constructive trust claim will fail in the absence of unjust
11 enrichment, and as the authorities in our brief make clear
12 in the bankruptcy context where the ultimate benefit of the
13 additional GBTC collateral isn't staying with the Debtors,
14 it's going to be distributed ratably to all of our
15 creditors, there's nothing unjust about that.

16 Even if the Court finds that they have adequately
17 pled unjust enrichment, that alone can't sustain a
18 constructive trust claim.

19 THE COURT: So, what's the relationship between
20 the first argument and the second argument? So, I'm
21 assuming your view is that if I find in the Debtor's favor
22 in the first argument, that that essentially in a way guts
23 the constructive trust argument because you say, well, this
24 is the way to read the contract. So, therefore, if they
25 weren't entitled to the security, they -- there can't be an

1 unjust enrichment.

2 MR. BAREFOOT: Well, I think you could also get to
3 the same place, Your Honor, by saying if I'm interpreting
4 the Security Agreement in the second amendment and I find
5 that those are valid contracts that govern this issue, that
6 alone precludes a constructive trust claim, because there is
7 an agreement that the parties memorialized that under which
8 they had rights and claims there was no need for a
9 constructive trust.

10 THE COURT: Right. Well, I guess what I'm saying
11 is if the Debtors prevail on the argument as to the security
12 interest, is it your view that there's no way they could
13 prevail on the constructive trust?

14 MR. BAREFOOT: I think they are independent, Your
15 Honor, and I don't think that dismissal -- in candor, I
16 don't think that dismissal of Count 2 --

17 THE COURT: Mandates a dismissal of --

18 MR. BAREFOOT: -- necessarily means that Count 4
19 would have to fail, unless you went with the theory that I
20 just articulated that if you are interpreting the second
21 amendment and saying that's the agreement that governs that
22 bars a constructive trust claim, I think in that way it --

23 THE COURT: Well, let me back up for a second and
24 ask it this way. I certainly can understand as a
25 theoretical matter that you could have a constructive trust

1 claim and a breach of contract claim and say -- I'm sorry, a
2 claim -- security interest, and if you found that the party
3 had no security interest, you could still potentially have a
4 constructive trust claim.

5 I guess my question is on these facts, is that
6 possible, or is it very much shorting your (indiscernible)?
7 You're either dead or alive, and if you -- if on these facts
8 you -- Gemini doesn't win on its argument about security
9 interest on these facts, it can't win in the constructive
10 trust?

11 MR. BAREFOOT: I think as long as Your Honor finds
12 that there is a valid and enforceable agreement and that's
13 what you're interpreting to determine whether there's a
14 security interest or not, I think that does foreclose a
15 constructive trust claim.

16 THE COURT: All right. I understand that you've
17 argued a number of things. I'm just trying to tease out the
18 -- how they relate.

19 MR. BAREFOOT: And there's eight different ways
20 you could skin that cat, and it's much more difficult, I
21 think, on the Gemini side to find enough factors to
22 plausibly state a constructive trust claim.

23 THE COURT: All right.

24 MR. BAREFOOT: So, let me turn, Your Honor, then
25 to -- I think that that brings us to the -- our response to

1 Gemini's motion to dismiss. So, first, Your Honor, they
2 moved to dismiss Counterclaim No. 4. Counterclaim No. 4
3 seeks a declaratory judgment that there was no security
4 interest in the additional GBTC. That is the 100-percent
5 mirror image of Gemini's Count 2, so I'm not going to spend
6 time on this, because in practice the dismissal of the
7 Debtor's counterclaim for a declaratory judgment would not
8 only be inconsistent with Gemini's Count 2 proceeding, but
9 it has -- it will have no practical effect.

10 As Gemini concedes, this Court is either going to
11 rule on the motion to dismiss in the context of Gemini's
12 declaratory judgment action or the parties are going to
13 proceed to discovery, and you'll hear from us at summary
14 judgment or at trial.

15 But one way or the other, as long as Gemini's
16 Count 2 for a declaratory judgment is going forward, there
17 will be a determination by the Court as to whether there was
18 a security interest in the additional GBTC collateral.

19 So, it really does nothing to -- other than give
20 them another bite at the apple to make the same contractual
21 arguments to say that our Counterclaim 4 should be
22 dismissed.

23 THE COURT: All right.

24 MR. BAREFOOT: So, then briefly, Your Honor, on
25 the safe harbors. To set the stage on this a little bit, we

1 certainly expect, and you've seen from the pleadings that
2 are now being cited back at us from our dispute with Three
3 Arrows Capital, there is a very unsettled area of law here,
4 and we certainly, after the close of discovery, expect to
5 have a very spirited debate with Gemini about whether the
6 safe harbors apply, but it's procedurally inappropriate and
7 not possible to foreclose the question of whether the safe
8 harbors apply based on essentially arguments made by another
9 Debtor in another proceeding that were never ruled on.

10 And they do say in their reply, Your Honor, they
11 make the point that GGC was a party to that claim objection.
12 That's correct, but the basis on which GGC moved to expunge
13 those claims was effectively a no liability, that, you know,
14 it had no relationship with Three Arrows. The relationship
15 with Three Arrows wasn't (indiscernible) GAP, the foreign
16 affiliate.

17 There was no evidence put in, in terms of either
18 the expert report or the declaration or the documents about
19 GGC. It was all about GAP. So, for example, when we --

20 THE COURT: So, but let me cut you off there. I
21 mean, this sounds very much like a motion for summary
22 judgment argument, right? I think that's your point, right?

23 MR. BAREFOOT: Correct, Your Honor.

24 THE COURT: Is that based on the pleadings -- and
25 I think they're going to say, I think their argument is it's

1 implicit that there's a representation that essentially it's
2 some sort of estoppel argument. There hasn't been a finding
3 by a Court, so it's really not res judicata or collateral
4 estoppel. So, I believe you correctly identified as sort of
5 a judicial estoppel argument that you've relied on something
6 for your benefit and can't change horses midstream.

7 But I'm guessing that your argument is that that
8 really is a factual discussion, not a pleading discussion,
9 right? In other words, you can't do it based on what I have
10 in front of me. We might be having a different discussion
11 if we were talking about summary judgment and what -- who's
12 got what burden and what that does, and whether the elements
13 are met.

14 But I think I understand your argument to be
15 that's not a today issue, putting aside whether you're
16 right, you're wrong, whoever is right, that that's -- is
17 that right?

18 MR. BAREFOOT: That's exactly right, Your Honor.
19 And they make the point in their reply that they actually
20 are not trying to invoke judicial estoppel, and they're
21 right that they couldn't because there was never any ruling
22 or finding on this.

23 The Three Arrows Dispute was obviously settled
24 before the Court heard any of the evidence that we filed
25 that they now rely on.

1 THE COURT: All right.

2 MR. BAREFOOT: Your Honor, they also kind of make
3 the point that this is not our pleading in the alternative,
4 that we didn't say this was in the alternative. There
5 really was no opportunity for us to say that this was in the
6 alternative. Aat the time, that was in a different
7 proceeding where we didn't yet have this adversary, but
8 there's no reason given the temporal difference and the
9 different procedural posture that we should be foreclosed
10 from making the argument that the safe harbors do not apply
11 and taking discovery to determine that.

12 I think one important position that I'd just like
13 to note in terms of discovery that we do need, they make
14 very, very much of the point that Gemini is a trust company
15 and therefore is a covered entity for purposes of the safe
16 harbors, but there's been no position taken by Gemini, much
17 less a ruling by Your Honor, as to whether Gemini is the
18 initial transferee or whether Gemini is a mere conduit and
19 the initial transferees are the (indiscernible) users
20 themselves. So, without that ruling, it would be really
21 inappropriate to say I'm going to dismiss the preference
22 action because we don't know who the initial transferee is
23 yet.

24 THE COURT: All right.

25 MR. BAREFOOT: And just finally, Your Honor,

1 there's no evidence here of what the assets were, right? We
2 have the -- we have as an exhibit to the complaint the
3 Master Loan Agreements, but those are just template
4 agreements, those don't discuss what the actual assets that
5 were being loaned or borrowed were, and what the term of
6 that loan or borrow was.

7 At minimum, I think as Gemini concedes, for these
8 to be commodities or securities agreements, we would have to
9 have evidence of what the assets were that were being loaned
10 and a determination as to whether those assets were
11 securities or were commodities.

12 That's not anywhere in the record. We don't have
13 anything in terms of the complaint or the exhibits as to
14 what was actually loaned that would enable the Court to make
15 a determination as to whether something is a security or a
16 commodity. That also could be a very much fact-intensive
17 question where the Court could benefit from expert reports
18 and the like.

19 And just finally, there is the two-day issue that
20 they also concede. Even if it is a loan of a security or a
21 commodity, in order for the safe harbors to apply, it has to
22 have a duration of more than two days.

23 THE COURT: Right.

24 MR. BAREFOOT: There's no allegations about for
25 all of the hundreds or even thousands of transactions what

1 the duration of them were, and if they were open term, which
2 I think many were, whether in practice any of them were
3 closed out within two days.

4 So, without that kind of a factual record that
5 would develop in discovery, I just don't see how the Court
6 can rule on the safe harbor arguments at this point.

7 THE COURT: All right. Thank you very much. Give
8 me a second to just check my notes over --

9 MR. BAREFOOT: Of course, Your Honor.

10 THE COURT: -- (indiscernible) you do the same. I
11 think I understand your view about the term agreed to pledge
12 -- agreed to pledge to language, which is relied upon by
13 Gemini as essentially being consistent with a next step as
14 opposed to an actual pledge itself or has pledged or
15 something to that effect, but I don't know if there's
16 anything beyond what's in your papers that you wanted to say
17 on that subject given how much ink has spilled.

18 MR. BAREFOOT: Your Honor, I think we can rest on
19 our papers on that.

20 THE COURT: All right. And with that, I do not
21 have anything further.

22 MR. BAREFOOT: Thank you very much, Your Honor.
23 I'll cede the podium to Mr. Shore for the committee. Oh,
24 excuse me.

25 THE COURT: Yes.

1 MR. BAREFOOT: I completely misspoke, and I will
2 cede the podium of my colleague, Mr. Massey, who's going to
3 address the hanging chad that I did not address, which is
4 the motion to dismiss the entirety of the complaint as to
5 the affiliate Debtors GAP and Holdco.

6 THE COURT: Yes.

7 MR. BAREFOOT: Thank you, Your Honor.

8 THE COURT: All right.

9 MR. MASSEY: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MASSEY: Jack Massey, Cleary Gottlieb Steen &
12 Hamilton for the defendants and counterclaim plaintiffs in
13 this matter.

14 As Mr. Barefoot alluded to, I'll be addressing the
15 Debtor's request for dismissal of all counts in Gemini's
16 complaint as to Genesis Global Holdco, LLC, or Holdco, and
17 Genesis Asia Pacific PTE Limited or GAP.

18 It is black letter law that a plaintiff must
19 allege facts sufficient to support a claim that is plausible
20 on its face as against each defendant. Here, Gemini has
21 made specific allegations as against GGC to which GGC has
22 responded, but as against Holdco and GAP, Gemini has made a
23 handful of allegations against "Genesis," which they define
24 as GGC, Holdco, and GAP, and they've made a handful of
25 specific allegations against Holdco and GAP that are

1 irrelevant to the relief sought.

2 Gemini admits that GGC was the only borrower under
3 the Earn Program, GGC was the only Genesis entity that was
4 party to the lending and security agreements that governed
5 the Earn Program, and GGC was the only entity that faced
6 Gemini in connection with the Earn Program.

7 Gemini's own pleadings state accurately that GGC
8 was the entity that received the additional GBTC shares from
9 DCG and did not pledge them on to Gemini, and these are the
10 core facts that give rise to Gemini's claims here. They all
11 concern GGC.

12 Gemini argues that Holdco and GAP are appropriate
13 defendants because their complaint includes factual
14 allegations against those entities, and this is just not
15 accurate.

16 In their complaint, genocide -- Gemini, excuse me,
17 speculates that Holdco or GAP "may be holding the additional
18 GBTC shares now, and that one or both of them may be
19 responsible for the decision not to transfer those shares."
20 These are not factual allegations. These are speculation,
21 and they do not form a basis on which a plausible claim for
22 relief can be stated.

23 Gemini also argues that their complaint alleges
24 that Holdco and GAP were "important players in the events
25 giving rise to Gemini's claims." They do not cite any

1 allegation in the complaint to support this statement.

2 THE COURT: So, I'm not -- I agree with you. The
3 important players language doesn't really -- I'm not sure
4 what that means, but the language about may be holding
5 shares, so is the notion that they have them in there
6 because if they can't be afforded complete relief if they
7 don't include them, what's your -- do you have any thoughts
8 on that?

9 MR. MASSEY: They mentioned that they don't
10 understand fully the corporate relationship between the
11 three Debtors and that we don't specify in our pleadings
12 whether Holdco and GAP might have an interest in the
13 security account in which the shares are held, and for that
14 reason, somehow that means that Holdco and GAP need to be
15 defendants in this action.

16 I don't think that gets you to it isn't possible
17 for there to be complete relief if Holdco and GAP are not
18 defendants in this action because, in fact, it is GGC that
19 has the security -- that has -- that holds the account, that
20 holds the shares.

21 Gemini has not pleaded otherwise. There's no
22 facts in the record to suggest that somehow Holdco or --
23 and/or GAP control that account, and I think that answers
24 the concern.

25 THE COURT: All right. And as to the other

1 language, may be responsible for decisions, I'm assuming
2 that your view on that is that that's too generic and too
3 general without something more?

4 MR. MASSEY: It's simply speculation. I think in
5 their pleadings, they allege that Gemini -- excuse me,
6 "Genesis" without specifying which entity, made the decision
7 not to transfer the shares on, and that's the basis for the
8 argument that maybe the other two Debtors may have had
9 something to do with that decision, but there's no more
10 particularized delegation than that, just to say maybe it
11 was a different one, and there's nothing in the record to
12 suggest that.

13 THE COURT: Well, I guess in thinking about that,
14 I'm not sure it matters. If the question is what the
15 security interest is, it either exists or it -- or a
16 constructive trust either exists or it doesn't exist, and it
17 doesn't really matter who decided to do what on those
18 counts.

19 I suppose it could potentially matter in discovery
20 on the equitable claim, but for the security interests, it
21 would seem to be irrelevant. Any other thoughts on that
22 language?

23 MR. MASSEY: No, I would just say I think that --
24 I think your take is quite right. I think that the facts
25 here are fundamentally not in dispute, and therefore who may

1 have been, you know, contributing to some -- to the decision
2 not to pledge the shares once they were received from DCG is
3 neither here nor there. The shares were received by GGC and
4 they were not pledged by GGC, and that's not in dispute.

5 THE COURT: All right. So, let me ask you a
6 similar question as I asked Mr. Barefoot in terms of the
7 relationship of this argument as to GAP and Holdco, as to
8 the other aspects of the complaint. What impact, if any,
9 does a ruling on the security interest question, the
10 constructive trust question, have as to GAP and Holdco?

11 If I -- so, one thing. If I rule in your favor,
12 or if I rule in Gemini's favor, any thoughts on that
13 question?

14 MR. MASSEY: Your Honor, it seems to me that the
15 claim that Gemini has here is against GGC. GGC undertook
16 all of the relevant actions here. GGC was the party that
17 faced Gemini in all of the relevant contracts, in the
18 relationship, and there simply not a -- there is no
19 equitable effect on GAP or Holdco against whom Gemini has no
20 particular claim or equitable claim that it doesn't have
21 against GGC.

22 THE COURT: All right. You had said before sort
23 of loosely that, you know, GGC has the shares, and I wasn't
24 sure if it was appropriate or not to take that as a
25 representation about a fact, because in some senses, it does

1 seem to moot out some of the dispute here, and as you know,
2 judges are always looking for practical solutions to
3 problems. So, I don't know if there's anything worth
4 discussing on that front.

5 MR. MASSEY: No, Your Honor. I think we have not
6 -- there simply aren't facts in the record as to, you know -
7 - there is fulsome discovery that needs to happen on this
8 case.

9 THE COURT: All right.

10 MR. MASSEY: And we're not representing at this
11 time as to, you know, the extent of the interests of the
12 other Debtors in that securities account, but I think the
13 point stands that there is no claim against Holdco and GAP
14 that is particular and separate from the claim that is
15 against -- properly against GGC.

16 THE COURT: All right. And I think you answered
17 the question about what happens if, for some reason, I
18 decide to entertain Gemini's -- I end up agreeing with
19 Gemini on the security interest and/or the constructive
20 trust, and what impact that has or doesn't have as to GAP
21 and Holdco.

22 If I conclude that -- so, flipping that, if I
23 conclude that I agree with you all on the security interest
24 and the constructive trust arguments, does that moot out or
25 just -- well, let me put it another way. Does that mandate

1 a dismissal of the counts of the complaint as to GAP and
2 Holdco because there's nothing left?

3 MR. MASSEY: I believe it does, Your Honor.
4 They've pleaded all of their claims as against all three of
5 the entities without specifying, you know, which allegations
6 support which claims, particularly as to which Debtor, and I
7 believe that to the extent that you dismiss the claims that
8 we're talking about here as to the additional GBTC shares,
9 that moots out the claims as against the other two Debtors
10 as well.

11 THE COURT: All right. Mr. Massey, anything else
12 that you'd like to address?

13 MR. MASSEY: No, that's all the points that I
14 wanted to touch on, so unless Your Honor has any further
15 questions, that concludes our full argument this morning in
16 support of the motion to dismiss, and we'll reserve on
17 rebuttal after hearing from Gemini.

18 THE COURT: All right. Thank you very much.

19 MR. MASSEY: Thank you, Your Honor.

20 THE COURT: Very happy to hear from you, Mr.
21 Massey, and now we'll hear from the committee.

22 MR. SHORE: I think it's good afternoon, Your
23 Honor from White & Case --

24 THE COURT: Well --

25 MR. SHORE: -- on behalf of the committee. The

1 committee is an intervenor in these adversary proceedings,
2 and we've committed not to be duplicative of anything that
3 the Debtors have been doing, and the fact -- but I want to
4 be clear, the fact that we haven't filed papers on this does
5 not mean that the UCC is not interested in this topic but
6 rather that we fully endorse what the Debtors have done,
7 what Mr. Barefoot and his team have done, in particular
8 bringing this issue to Your Honor quickly so that we can get
9 it resolved prior to confirmation.

10 Let me start here and explain maybe for -- less
11 for you and more for the people watching why the committee
12 is siding with the Debtors on this and against a large group
13 of creditors.

14 In any big case, the UCC is keenly interested in
15 allegations that a Debtor granted a security interest to a
16 party, to an unsecured creditor, on account of an antecedent
17 debt.

18 That is the allegation here. There were loans
19 that were outstanding and the creditor came and said I want
20 a grant of a security interest, and the Debtors are alleged
21 to have done that.

22 It gets even more keen when that transfer is done
23 either within 90 days prior to the petition or within one
24 year, depending on whether it's an insider or not, and even
25 most keen when, whether or not that creditor actually got a

1 validly perfected security interest, has such a demonstrable
2 effect on creditor recoveries.

3 To be clear, the Gemini complaint says recognizing
4 the security interest will be a boon to the Gemini
5 creditors, but it will be a horrible result for the general
6 unsecured creditors, the Debtors who will not be looking to
7 that additional collateral until the Gemini lenders are paid
8 in full.

9 In any big case, when a committee is looking at
10 that situation, a grant of a security interest in an
11 antecedent debt, we're really focusing on two issues, the
12 actual grant or transfer of the interest in the Debtor's
13 property, and the appropriate notice to the creditor body by
14 perfection.

15 We've got issues with respect to both grant and
16 appropriate notice with respect to tranche one. That's not
17 an issue that we're going to address today. What we are
18 addressing is the tranche two, or what people have been
19 calling the additional collateral, and it's both an issue
20 with respect to the purported grant and to appropriate
21 notice.

22 Throughout the Gemini papers, they use the word
23 myopic focus on the grant. That's exactly what has to be
24 done and what's done in every case, and that's what ends up
25 with results where a creditor who thought they were getting

1 a lien on a million shares of stock got a lien on 1,000
2 shares of stock, because the person who typed up the grant
3 on no sleep wrote the word 1,000. It's what causes somebody
4 who put a grant with the long name and not the abbreviation
5 was found not to have a security interest, or the opposite,
6 that they used the abbreviation and not the long name, and
7 it goes a little bit to the notice issue.

8 But the fact is in bankruptcies all the time, if
9 you don't get an exact grant with myopic focus by UCCs and
10 the Courts on what is actually granted, there's nothing
11 unfair about that, going back to the question you raised.
12 It's just the operation of the law, because it's not fair to
13 the general unsecured creditor body to be giving away
14 property interests of a Debtor when in fact, based on the
15 gestalt of the deal, rather than the exact language that the
16 parties put in the grant in Section 2 of the Security
17 Agreement that's in the record.

18 It is-- these kinds of grants are strictly
19 construed without the regard to subjective beliefs or the
20 gestalt of the deal, as I said. This particular grant, as
21 Mr. Barefoot laid out, has a two-step process, and the
22 second step requires a transfer to Gemini or somebody that
23 Gemini controls, and that's not an oddity here. It's
24 exactly what's needed. There's -- just as an aside, there
25 is a debate in the crypto community, the crypto lender

1 community, as to how you go about perfecting a lien on
2 crypto. Can you do a grant of an interest in a security
3 agreement, do a UCC one, file the financing statement in the
4 appropriate place, also very difficult to figure out in a
5 crypto world, and perfect your interest that way, or do you
6 with a grant of interest and possession?

7 This regime is clearly the latter. The security
8 agreement makes clear in Section 1, there needs to be a
9 transfer of collateral. There is no UCC -- contemplated UCC
10 1 financing statement or DACA contemplated in the security
11 agreement and no allegation that either exists.

12 This is a possession perfection regime, and Mr.
13 Barefoot raised the issue of plausibility and noted, quite
14 correctly, why are you calling every day to get possession
15 of the collateral if possession of the collateral was not
16 necessary?

17 But let's focus on this other point. The -- Count
18 3 is premised on the following story. Three AC happens.
19 Gemini appropriately goes out and hires counsel to say what
20 is the effect of this. The lawyers say you got to get a
21 security interest, and they talk about how they're going to
22 go about getting that security interest.

23 What they're saying now is what we actually
24 contemplated was that we get a security interest in
25 something that we weren't going to perfect. That makes no

1 sense. Why would you ever take a security interest in
2 collateral when you have no ability to perfect that security
3 agreement -- interest?

4 So, obviously, what was happening here was a grant
5 of a security interest in what would fall into Gemini's
6 hands, either Gemini directly or somebody on behalf of
7 Gemini holding it for Gemini, and that's how the perfection
8 regime was going to work. It was not this idea that what we
9 were going to do is grant a security -- as I said, grant a
10 security interest in something that we couldn't perfect on.

11 It also, this allegation that we have an interest
12 in property that we're not going to be able to perfect,
13 amounts to a secret security agreement, and there's a lot in
14 the law on the disfavoring of secret security agreements,
15 and that brings me to the issue of creditor notice.

16 There's no UCC 1, no DACA. There's no -- there
17 will be no -- under their theory, there will be no notation
18 in the financial statements of Genesis of the interest in
19 the property, which is still on the books of GGC. GGC will
20 just have a financial statement that says we hold all this
21 additional -- all these additional shares, and there'll be
22 no notation that those shares are either pledged or that
23 they're in the -- they're currently being held as collateral
24 for another loan.

25 So, it's not only -- it's going to throw a lot of

1 "nots" in here, it's not only not unjust for Gemini to
2 obtain its interest post-petition, it's actually unfair to
3 the unsecured creditor body, many of whom who deposited
4 after August 2022, for the Court to recognize a security
5 interest or ownership interest in hundreds of millions of
6 dollars of GBTC which is on -- recorded on GGC's books or --
7 not getting into that debate over which entity -- on the
8 Debtor's books.

9 THE COURT: And so, your point I'm taking is that
10 by moving the collateral off the books, it's no longer
11 secret, meaning no one's relying on that as collateral on
12 the books because it's not on the books. It's been
13 transferred.

14 MR. SHORE: Right, and that's why they -- that's
15 why you need to do a strict construction of both the grant
16 and focus on why that grant is being given in what would be
17 possessed, because that's the event that's going to provide
18 the notice.

19 So, when we think -- and I'm not trying to fault
20 Gemini for what they did. Obviously, they attempted to be
21 proactive. They tried to do the best they could to secure
22 their fiduciary's recoveries, and they were let down by the
23 Debtor.

24 Okay. But everybody's been let down by the
25 Debtor. All the unsecured creditors, almost the entirety of

1 the unsecured creditor body had contracts with the Debtor
2 where the Debtor said they're going to get back cash or
3 crypto and they didn't.

4 But what they're asking for now, what Gemini is
5 asking for now, is for you to create a new cause of action.
6 I'll end here focusing on that last thing, which is the
7 constructive trust and how does that relate to whether or
8 not they have a security interest.

9 It happens all the time, as I said, that secured
10 creditors or purported secured creditors are found not to be
11 secured because the grant was defective, but you can't
12 create a new cause of action that no Court has found before
13 that the breach of the promise to provide a preference in
14 and of itself elevates the recovery of the party, the
15 creditor, who was promised that preference, particularly
16 where the promise here was for a purported safe harbor
17 preference.

18 It is a new cause of action, but the correct
19 result if the party does not have an appropriate grant is to
20 have them share in the collateral as a peer unsecured
21 creditor with everybody else. It is not to elevate their
22 claim, either by saying actually it's no longer the Debtor's
23 property, or it's subject to a constructive trust, or we're
24 just going to treat it as the transfer had occurred and find
25 that it's safe harbor.

1 The Gemini creditors, in the event that the Court
2 rules that the additional collateral is the Debtor's
3 property, it's not subject to a security interest, it's not
4 subject to a constructive trust, is for everybody to share
5 ratably in that unencumbered GBTC share pool.

6 And so, we'd ask you to -- without regard to
7 dealing with the first count or any of the issues with
8 respect to the initial grant, and the initial delivery,
9 dismiss Counts 3, 4, and 5. Was that 2, 3, and 4? Two, 3,
10 and 4.

11 THE COURT: (Indiscernible) you can speak freely.
12 I had it all written down at one point. I'm not -- well, I
13 confess not to be currently tracking the numbers.

14 MR. SHORE: But I would add one more procedural
15 point. I think the impact of the fact Gemini has
16 affirmatively sought the Court's ruling with respect to the
17 grant issue, and the interpretation of the security
18 agreement through their motion to dismiss, means that I
19 think what we're talking about is the dismissal with
20 prejudice at this point.

21 I don't think we're talking about go back and see
22 if you can replead it. They've put that contract
23 affirmatively in front of Your Honor for your ruling. So, I
24 think if you did rule that they were not granted a security
25 interest in that collateral, but it is nonetheless the

1 subject of the security agreement and the loan agreement,
2 they don't have a constructive trust. I think all those
3 claims go away with prejudice without leave to replead.

4 THE COURT: All right. Thank you.

5 MR. SHORE: Thank you, Your Honor.

6 THE COURT: All right. It is now just about
7 12:15. I have a judge's meeting at 12:30, and so my
8 inclination would be, unless this does great harm to
9 anyone's schedule, is to break now and then come back after
10 lunch and then have Gemini present its argument and then
11 follow up with rebuttal.

12 I don't think it's fair or efficient or wise to
13 have you start and then stop, but I don't have a monopoly on
14 wisdom. So, I don't know if anybody has any other ideas, so
15 I'll first look to Gemini.

16 MR. BURKE: Donald Burke for Gemini. That makes
17 sense to me, Your Honor. I think it would be disruptive to
18 have to stop and start again.

19 THE COURT: Yeah. All right.

20 MR. BURKE: I prefer to just go straight through
21 if it's --

22 THE COURT: All right. Sometimes you end up
23 saying the same thing twice when judges ask you questions
24 that lead to that, but you shouldn't have to -- you
25 shouldn't set it up so you are stuck with that problem right

1 away.

2 So, let me ask. Other than completion of this
3 argument, I think everything else on the agenda has been
4 addressed.

5 MR. BAREFOOT: That's correct, Your Honor.

6 THE COURT: All right. So, let's adjourn to 2:00.
7 You can enjoy the wonderful environs of White Plains, and I
8 will see you then, and thank you for your flexibility.

9 (Recess)

10 THE COURT: Good afternoon. Once again, this is
11 Judge Sean Lane in the United States Bankruptcy Court for
12 the Southern District of New York, and we are resuming this
13 afternoon our oral argument in the Gemini Global Holdco
14 case, particularly in the adversary proceeding where motions
15 to dismiss have been filed.

16 We heard from the Debtors in the committee and now
17 it's the opportunity for Gemini Trust Company to present its
18 argument. So, without further ado.

19 MR. BURKE: Good afternoon, Your Honor. Donald
20 Burke, Willkie Farr & Gallagher for the plaintiff, Gemini
21 Trust Company. As you've already heard today, the parties'
22 motions present many legal issues that I want to walk
23 through, but I think it might be helpful just to step back,
24 you know, and check out the forest before we get to the
25 trees.

1 There are two undisputed points, or points that
2 have to be taken as undisputed for purposes of these
3 motions, that are important just to set the basic lay of the
4 land.

5 The first, and I think this is totally undisputed,
6 is that the entire point of the second amendment was to
7 provide additional security to Gemini on behalf of the Earn
8 users to grant a secured interest in these additional GBTC
9 shares that Gemini had sought to, you know, get the security
10 interest to protect and manage risk on behalf of those Earn
11 users.

12 All of the parties to the second amendment
13 intended that result, and I think that much is clear on the
14 face of the second amendment itself, and I think it's clear
15 from the concession we heard from Mr. Barefoot that --

16 THE COURT: Well, it's also an allegation of the
17 complaint, which is taken as true for purposes of today's
18 motion.

19 MR. BURKE: That's exactly right, Your Honor. The
20 second point that I think has to be assumed to be true for
21 purposes of today's proceedings is that the additional
22 collateral is property that the Debtors now hold only
23 because of the second amendment and this three-party
24 agreement to provide additional security to the Earned
25 users. That's the upshot of Paragraph 39 of our complaint

1 where Gemini alleges that DCG's sole purpose in delivering
2 the additional collateral was this contemplated further
3 transfer onto Gemini and to provide security to the Earn
4 users pursuant to the second amendment.

5 THE COURT: Well, I don't think anybody disputes
6 those, and again, they're taken as true for purposes of the
7 motions, but I don't know it changes the fact that we have
8 to parse the agreement and figure out what the agreement
9 means and how to interpret that, right?

10 I mean, so I don't -- so, does that -- what do you
11 want me to take from these two points vis-à-vis sort of
12 understanding of the contract language?

13 MR. BURKE: Well, I think the first point I think
14 really does go to interpretation of the second amendment,
15 and it provides the background against which the Debtors
16 seek to read the second amendment in this self-defeating
17 manner where GCC can benefit from its own wrongful conduct.

18 THE COURT: But is it -- well, is it self-
19 defeating? I mean, it seems like there's an argument for
20 breach of contract, but as for self-defeating, with
21 sophisticated parties like that, and even without
22 sophisticated parties, I mean, sometimes we do exactly the
23 same contract interpretation in Chapter 13 cases involving
24 individual Debtors. We look at what the language of the
25 contract says.

1 And certainly, the threshold challenge that you
2 have is the plain language seems -- it talks about two
3 transfers. And so, it seems that you're trying to look
4 behind the two-transfer concept to say the two-transfer
5 setup is not significant or something that needs -- controls
6 in these circumstances.

7 So, let's just jump right into that.

8 MR. BURKE: Sure. So, I think the primary answer
9 to that concern is, as we laid out in our brief, like any
10 contract, the second amendment has to be construed --
11 understood in light of its overall intent, and it has to be
12 read as a whole.

13 And so, I think it is a fundamental flaw in the
14 Debtor's submission here to focus so myopically and
15 exclusively on Section 2 of the Security Agreement.

16 THE COURT: But I think -- I mean, let me start
17 where I started with the Debtors. You know, when you look
18 at the facts alleged, and the timing, it seems like things
19 were going poorly. Gemini asked for additional security,
20 and there is a security agreement, there's a first
21 amendment, and there's a second amendment, and indeed,
22 there's not much time in terms of the calendar time between
23 the first and second amendment, and then there's a
24 bankruptcy.

25 So, it's -- it just seems like there's -- things

1 are in a state of difficulty, and the Debtors are saying
2 it's not as if the reading of it is contrary to the
3 circumstance or somehow does violence to the contract. It's
4 just that that last step was not taken and that you look at
5 it like any other steps that need to be taken for security
6 interest, and maybe there's a breach of contract claim, but
7 there's -- it's just there are steps in the sort of
8 continuing deterioration of the economics here. That step
9 was never taken. So, that's their view of it. So, what do
10 you make of that?

11 MR. BURKE: So, I agree that that's the Debtor's
12 submission here. I think the flaw in it, or where I would
13 push back, is that I think the understanding that the
14 Debtors have advanced, that the second transfer is
15 absolutely necessary to cause a transfer of the security
16 interest, I think that can't be squared with other aspects
17 of the agreement that we've cited and discussed in our
18 brief, and I think, you know, in our view, those other
19 provisions of the agreement are sufficiently incompatible
20 with the Debtor's understanding that they've foreclosed it
21 as a matter of law. That's why we've, you know, cross-moved
22 on their counter for declaratory relief.

23 THE COURT: But if that's the case, how -- your
24 reading, does it read out the second transfer as being
25 unnecessary? And so that's -- that seems to be significant.

1 MR. BURKE: So, I think what we understand the
2 language that the Debtors have focused on in the second
3 amendment to really deal with and focus on is a situation
4 where additional collateral might have passed between
5 Genesis and Gemini pursuant to a -- the collateral --

6 THE COURT: But it doesn't say that. I mean,
7 there's nothing in the agreement that says that in the event
8 that there's additional collateral or these other facts and
9 circumstances, then it's relevant or not relevant that
10 there's this second transfer.

11 It says this is the way the collateral works, and
12 there's one transfer and there's two transfers. There's a
13 transfer that vests title and then there's another transfer,
14 and it doesn't separate out those two transfers as being
15 done for different purposes or under different
16 circumstances. It contemplates they're going to happen, if
17 not together then sort of logically follow.

18 So, I didn't see anything in the agreement that
19 seems to put any daylight between the two as an intellectual
20 matter, like here, the significance of the first transfer is
21 that that's the security interest. The significance of the
22 second transfer is if these things happen.

23 I'm just looking for something in the agreement
24 that signals that that would be the case, and what would you
25 point me to?

1 MR. BURKE: I think I understand the question, and
2 I guess my response is that the -- it's really Section 1 of
3 the Security Agreement that we think is particularly
4 important, right, because that's where the two tranches of
5 collateral that were designated, and you know, were within
6 the contemplation of the parties as collateral are
7 identified.

8 You know, originally in the first iteration of the
9 Security Agreement, Section 1, that's the provision titled
10 transfer of collateral, that referred only to that initial
11 tranche of collateral and had an obligation to pass it along
12 to Gemini.

13 And then the second amendment basically strikes
14 out the content of Section 1 and replaces it with a new
15 Section 1 that includes both the initial tranche and the
16 additional tranche of collateral.

17 And so, the way we understand it is that the --
18 those provisions identify the assets that, you know,
19 everybody understood to be the subject of the
20 (indiscernible) agreement.

21 And then we do have a separate provision in
22 Section 2 by which, you know, other assets could potentially
23 become collateral in the future based on a transfer to
24 Gemini pursuant to the collateral top-up arrangements that,
25 you know, were elsewhere in the Security Agreement.

1 And I think the sort of important next step of the
2 argument, Your Honor, is to think about other provisions in
3 the agreement that we just don't think can make sense if
4 collateral is understood in the way that the Debtors propose
5 here. I don't think --

6 THE COURT: But here's the thing, though. Looking
7 at the second amendment, the second paragraph talking about
8 this additional collateral, right, that's the 31 million,
9 right? It's the second paragraph. It talks about the
10 parent transferring it to the pledgor, and then the pledgor
11 has to transfer it, and it's not the parent that's
12 identified as the pledgor. It's GGC, right? They're the
13 pledgor, Genesis Global Capital.

14 And so, it doesn't -- I mean, that seems to be
15 consistent with the notion it's the second transfer, because
16 that's when the pledge happens, because the parent is just
17 the parent and they're transferring it to the pledgor, but
18 it's not -- right, if you use the term parent, you're not --
19 you're -- to the -- and to pledgor, like that's the party
20 that's going to make the pledge. So, how do you understand
21 that second paragraph in light of the language that's used?

22 MR. BURKE: So, we understand the second paragraph
23 that you just read from, Your Honor, to be a related but
24 distinct issue from the question of whether, you know, a
25 particular asset is collateral under the agreement, right?

1 We certainly agree that GDC was obliged under the
2 agreement to transfer the collateral -- additional
3 collateral onto Gemini, and they were in breach of that
4 obligation, and they freely concede that they're in breach
5 of that obligation.

6 They -- I think that the Debtors try to argue that
7 Gemini's sort of ongoing pursuit of the additional
8 collateral should be taken as some kind of --

9 THE COURT: Well, I'm not -- let's stick with the
10 language of the agreement for a second before we get into
11 sort of what are extraneous facts, because we're not on
12 summary judgment. But again, that second paragraph uses the
13 term pledgor to talk about GGC and identifies the parent as
14 the parent.

15 So, your theory, as I understand it, from your
16 papers is that the parent is somehow pledging it, like you
17 just skip the second transfer entirely, that the second
18 transfer is not necessary to make the security agreement
19 effective, and I'm just trying to understand that in light
20 of the fact that this paragraph seems to contemplate that
21 two-step process by referring to GC as the pledgor, and not
22 only that, but the act of -- the relevant act, meaning that
23 this is the security agreement and the second transfer has
24 to happen.

25 So, am I missing something about the terminology?

1 Is it somehow in your way -- in your reading irrelevant that
2 it talks about parents and then in the second one it talks
3 about the pledgor transferring or caused to be transferred?

4 MR. BURKE: So, Your Honor, I think there are sort
5 of two layers to the question. I want to try to divide them
6 up and respond to them separately if that's okay.

7 The one aspect of the question or one aspect of
8 the issue here is the fact that there is an obligation to
9 sort of further transfer onto Gemini, and I think we agree
10 that that obligation exists, but we don't think that's the
11 trigger or the sort of effectuating event for the granting
12 of a security interest.

13 The first point, and I want to make sure I respond
14 to it, is the designation of GGC as the pledgor, and I think
15 that that's important, and I think that explains our
16 understanding that the sort of conveyance of the security
17 interest occurs upon receipt of the collateral by --

18 THE COURT: But that -- the language says -- so,
19 first it talks about the parent transferring the shares to
20 the pledgor, and then it says as promptly as practical after
21 such assignment, conveyance, transfer or delivery. So, it's
22 separating out two separate events, because it says after
23 this happens, this shall happen, and the pledgor shall do
24 the following.

25 Doesn't that run against your reading that somehow

1 these things are not -- the two steps are not legally
2 significant?

3 MR. BURKE: I don't think so, Your Honor, because
4 the -- nothing in that language identifies that second step.
5 It's obviously there. I don't dispute that it's in there.
6 Section 1 doesn't identify that second step as the event
7 that gives rise to the security interest.

8 And so, I think it's consistent to say that --

9 THE COURT: But it uses the term pledgor, right?
10 I mean, that's significant, right? Saying that this is the
11 entity that is pledging this security. And so -- and it's
12 also by talking about after this first transfer conveyance,
13 the second step is supposed to happen.

14 And so that, right, I think those two things sort
15 of work in tandem in terms of separating out the events to
16 sort of just a common reading. I don't know that this is --
17 I mean, we see a lot of impenetrable contract language here
18 in this court where we have to figure out a lot of things
19 that are -- people will say are clear as day, but they're
20 not.

21 This doesn't seem to be that difficult to
22 understand in terms of saying as promptly as practical after
23 this first event, the pledgor shall do the second event.

24 MR. BURKE: Right. I totally agree with you about
25 the sequence of the events that's contemplated here. I

1 guess maybe another way to try to try to address the concern
2 is to direct Your Honor's attention up one paragraph to the
3 -- which reprints the language that was -- that, you know,
4 already existed in the security agreement to deal with the
5 initial tranche.

6 THE COURT: Right.

7 MR. BURKE: And in there, GGC is referred to as
8 the pledgor, right? That's the defined term for GGC in the
9 document as a whole, and there's no sort of two-step
10 arrangement contemplated there, because those were GBTC's
11 shares that were already on the books at GGC at that point.

12 THE COURT: Right.

13 MR. BURKE: And I don't think the sort of
14 sequential timing or the nomenclature used to refer to the
15 parties would necessarily indicate that it's that second
16 transfer that is sort of the moment at which the security
17 interest --

18 THE COURT: But why is that? If the first one
19 says there's only one step to make it effective, and the
20 second one says it's two steps, we know how to do it in one
21 step, but we decided to do it in two steps. Doesn't that
22 undercut -- you know, and also the idea is for the first
23 one, it says the pledgor shall do X, and then it becomes
24 effective, and the second one says the pledgor shall
25 essentially do the second step, and then it becomes

1 effective. I'm not sure that that supports your reading
2 unless maybe there's something I'm missing.

3 MR. BURKE: Well, I guess where I would push back
4 a little bit is that the language doesn't say "and that's
5 when it becomes effective." I think that is additional
6 language that sort of means --

7 THE COURT: Well, I'm -- yes, I would agree.
8 That's my conclusory label that I'm slapping on it. No
9 contracts ever -- they don't usually say that, but in terms
10 of talking about transferring these things, I assume that
11 every -- that's the undercurrent, is exactly when is it
12 going to be effective in terms of providing security for
13 Gemini.

14 But anything else you wanted to say on this second
15 paragraph or on Section 1 at all?

16 MR. BURKE: Well, I think I did want to make the
17 point, and I think this sort of maybe skips ahead a little
18 bit to the context -- the contextual, you know, provisions
19 that we were talking about before, but it's just important
20 to be clear here the way that the second amendment works and
21 how it sort of maps onto the first amendment.

22 THE COURT: All right.

23 MR. BURKE: The second amendment, you know, as you
24 see on the page we were just reading from, sort of goes
25 back, strikes out what was in Section 1 and replaces it with

1 this larger provision.

2 That's important because it shows that, you know,
3 even after the second amendment, we had this what we regard
4 as a very strange situation that the heading here refers to
5 transfer of collateral, which doesn't make sense if you
6 adopt the Debtor's reading. And --

7 THE COURT: Well, but again, I'm not -- I mean,
8 there's case law that says you don't read titles to undo the
9 language -- the actual provisions of an agreement in a
10 contract. But also, it's a short -- and that's because why,
11 as a practical matter, titles are shorthand, right?

12 So, when you're talking about collateral, I don't
13 know that it necessarily tells you when it becomes
14 collateral except it says this is the paragraph that deals
15 with collateral. And so, it lays out all the provisions.
16 So, I'm not -- it's a lot of weight, a lot of water for a
17 title to carry if you want me to somehow say, well, it reads
18 in that it's collateral from the get-go.

19 I mean, I'm not sure how I stick the title in the
20 middle of the two transactions, because then your reading,
21 if it's collateral from the beginning, well, then it's
22 collateral even before the parent does anything.

23 MR. BURKE: Well, I think I was at least trying to
24 articulate an answer to that concern previously, and I think
25 that's actually where designating GGC as the pledgor

1 actually is important, and I think at least from our
2 perspective, that's why the delivery of the assets, the
3 designated GBTC shares to GGC, makes sense as the sort of
4 moment at which the security interest was -- would attach.

5 So, I think, you know, we would -- our position
6 here is that before it gets there, it wouldn't make sense to
7 treat GTC as a pledgor. It doesn't even have the --

8 THE COURT: No, I agree, but just because it
9 doesn't make sense to treat them as a pledgor under the
10 circumstances, other than sort of being the result, I'm
11 having trouble following how this language here gets you to
12 the result you want of saying that step one, end of story,
13 step two is there for other things, because the other things
14 aren't mentioned in here, and there doesn't seem to be any
15 language that suggests that there's that separation in the
16 party's mind to understand that that -- those two-step
17 processes somehow leads to -- or is a reflection of other
18 events to come. And that's sort of where I'm struggling,
19 counsel, to understand looking at the agreement how you get
20 step one to be the one that counts and step two to be the --
21 to be essentially irrelevant.

22 MR. BURKE: Well --

23 THE COURT: I shouldn't say irrelevant. That's --
24 to not be of significance for purposes of security.

25 MR. BURKE: Right. I -- if it's helpful, I can

1 explain why I don't think it's irrelevant and why some of
2 the arguments we've heard from the other side don't really
3 hang together.

4 I mean, it was obviously important to Gemini to
5 get, you know, actual delivery of these shares. You know,
6 we have acknowledged that Gemini, you know, as anybody
7 would, made efforts to secure actual delivery of the assets.
8 But I don't think there's the logical connection that the
9 Debtors are trying to draw between those activities by
10 Gemini and a suggestion that the shares were not already
11 subject to the security agreement at the time, because
12 there's plenty of other reasons why Gemini would want to
13 actually have them in their possession. Obviously, it
14 facilitates enforcement of the security interests. Probably
15 wouldn't be in this situation.

16 THE COURT: Yeah. No, I get it. And I apologize
17 to all the parties to the extent I opened the door to this
18 conversation. I was trying to sort of take a top-level
19 view, but I recognize that extrinsic evidence is extrinsic
20 evidence.

21 We're here on a motion to dismiss. I take the
22 allegations of the complaint as true. We don't look at
23 extrinsic evidence. We can look at the contracts that are
24 attached and their reference, so they're incorporated, even
25 if they weren't attached, but they're attached.

1 So, that's all nice in terms of understanding why
2 we may have ended up here, but it's -- for purposes of the
3 motion to dismiss, for -- and the security question, I --
4 they're irrelevant. Maybe they're relevant to the -- to
5 your other claim, but I don't think it matters.

6 MR. BURKE: I think that's how we see it as well,
7 Your Honor. I --

8 THE COURT: Yeah. That's fair.

9 MR. BURKE: Could I sort of circle back to the --
10 your concern you raised about giving too much effect to the
11 title of the provision?

12 THE COURT: Right.

13 MR. BURKE: Because I think that's a legitimate
14 concern. It's something that, you know, warrants attention
15 here. I guess my first point is I don't understand the
16 Debtors who have argued that a title is categorically
17 irrelevant to the interpretation of a contract. I -- maybe
18 I missed that. I don't think I've seen that argument from
19 them.

20 And I would emphasize that unlike many other
21 agreements, this one doesn't have the provision that sort of
22 expressly instructs the interpreter not to give effect to
23 section headings and the like.

24 So, I think that's, you know, a salient fact to
25 consider here. You know, as we've heard several times,

1 these are, you know, sophisticated parties and they could
2 have included that --

3 THE COURT: But the heading doesn't say the
4 transfer of the collateral occurs after the transfer from
5 the parent. It says transfer of collateral. And so, I
6 mean, putting aside the question of whether it's -- the
7 heading's gone entirely because Section 1 is amended and
8 restated in its entirety to follow and there is no title at
9 all, but I'm not quite sure how the title gets you where you
10 want to be, because again, it's a very general title about
11 transfer of collateral.

12 So, it doesn't say when the transfer of collateral
13 -- that's what the paragraph does. And so -- and people
14 disagree about the result of that, but I'm not sure -- how
15 is the language of the title transfer of collateral get you
16 to have it effective after the first transfer but not the
17 second.

18 MR. BURKE: So, two-part response to that if
19 that's okay. I think the way that we think about it, it's
20 sort of less specific, you know, guidance, you know, from
21 the section heading in terms of which, you know,
22 understanding of the agreement you have to -- the
23 interpreter should adopt. I mean, I'll grant you, it's a
24 very brief section heading, and you know, it's not
25 profoundly detailed. That's certain here.

1 But I think the problem for the Debtors here is
2 that it's unnatural to refer to transfer collateral if the
3 thing that is being transferred pursuant to this -- these
4 various steps isn't collateral until the very end, right?

5 We -- I think that would --

6 THE COURT: But again, if that's your point, then
7 you seem to be implying that it's transfer of collateral the
8 moment it's spoken of, which is clearly not the case because
9 it hasn't left -- the first initial transfer hasn't left the
10 pledgor, and for the second one, it hasn't left the parent.

11 So, I don't know that it -- how it informs --
12 again, you want to jump in in the middle of a process. So,
13 relying on the heading seems to say it is from the beginning
14 of time or we just look to the paragraph, and if it is from
15 the beginning of time, that doesn't work. So, nothing about
16 the title tells me that we should jump in in the middle of
17 the two transfers, and that's where I'm having the problem,
18 because if it's referring to collateral and you say, well,
19 that means everything -- any reference to these shares means
20 they're collateral from the get-go, then that means they're
21 -- that means there's a security interest before they're
22 ever transferred in any of these circumstances. I mean,
23 that the logical outgrowth of the argument.

24 MR. BURKE: I think I understand the concern, and
25 I think that's where the designation of GGC as the pledgor

1 doesn't work here, and I think that's why it makes sense to
2 us to sort of -- you know, we don't see it as sort of
3 jumping in the middle of the, you know, the steps or however
4 it was described.

5 I think it's always collateral. That's I think
6 the sort of overriding understanding of the agreement, but
7 you have to add on the fact that GGC is the pledgor, and so
8 it doesn't make sense to think about a security interest
9 having been transferred before GGC even has any possession
10 of the collateral.

11 THE COURT: But for the first paragraph, and I
12 guess I know there's other things, are you maintaining that
13 those shares are collateral before -- those 30 million
14 shares are collateral before GGC transferred them to the
15 Great Scale Bitcoin Trust?

16 MR. BURKE: Sorry, this is the first -- the pre-
17 existing language.

18 THE COURT: Yeah, the first -- yeah, the pre-
19 existing line.

20 MR. BURKE: Yes. Yes. I mean --

21 THE COURT: You're saying they're collateral
22 before they're transferred?

23 MR. BURKE: Right. Right. I think it's the same
24 logic. We don't understand the transfer to be the -- I
25 mean, I think they are undeniably collateral once they've

1 been transferred. I think, you know, that's the Debtor's
2 understanding of the agreement. And so, you know, at that
3 point, there's not even a dispute, but I think our position
4 would extend to both of these paragraphs, because they use,
5 you know, the same language and it's the same conceptual
6 set-up.

7 THE COURT: All right. I'm having -- I will admit
8 that I'm having trouble following how that works if they're
9 collateral from the beginning of time once the title is put
10 on there, but I think we've I think had our discussion as
11 far as we can go. If there's other things you want to throw
12 in there on that, that's fine, but I think we've gone back
13 and forth.

14 So, sticking with the language of the agreement
15 and the security interest question, what else shall we chat
16 about?

17 MR. BURKE: I think the other -- really the only
18 other point that I think I wanted to make sure I got to is
19 Section 5 of the agreement we think provides additional
20 contextual evidence.

21 There are representations and warranties in this
22 section that really don't make sense if the collateral
23 becomes collateral only after it's transferred, right? In
24 Section 5, GGC represents that it's the sole owner or the
25 collateral or it has the right to transfer it.

1 If you adopt the Debtor's understanding of the
2 chronology here, then I don't think that representation can
3 really make sense, because after the collateral has been
4 transferred on to Gemini, GGC no longer has any right to
5 transfer. It doesn't even have it at all, so.

6 THE COURT: But again, I'm just having under --
7 I'm not sure what you want that paragraph to say then. I
8 mean, so people talk about plain meaning in contract
9 language. Are we supposed to spill a lot of ink to say that
10 GGC is the pledgor, but it doesn't-- the collateral isn't
11 pledged until after the transfer?

12 I mean, I'm just -- it seems to be a fairly
13 standard-looking paragraph as is often the case to say if
14 we're going to pledge something to you, we have to represent
15 we're the owner of it, and it's not the tail wagging the dog
16 saying we're telling you exactly how the security interest
17 should operate and what makes it effective, but we're just
18 saying that we have -- we own the property so that can -- it
19 can be used as collateral. It can be pledged as security.

20 And I'm -- so, what would you say to that concern
21 that I have that -- in the section -- you want to talk about
22 titles, in the section about representations and warranties,
23 where it's basically saying we want to make it clear that if
24 we're going to get this to you as security, we actually own
25 it.

1 I mean, that's what that paragraph says to me. Is
2 there a reason why it should carry more water in this
3 particular debate when we have this section talking about
4 the actual transfer of collateral in Section 1?

5 MR. BURKE: Right. So, I would draw your
6 attention to the prefatory language in Section 5 before you
7 get to the A's and the B and the C. The pledgor represents
8 and warrants to the agent as of the date hereof, and on each
9 day that any loan remains outstanding, that -- so, I think
10 the -- there's a chronological point there. That
11 representation and warranty is made upon execution of the
12 agreement before transfer of any assets to Gemini, right?
13 In Subparagraph A there's a warranty or --

14 THE COURT: So, you're telling me we could take
15 transfer of collateral out that first section and it
16 wouldn't matter, because Section 5 transfers the collateral
17 and makes the security of your client?

18 MR. BURKE: I don't think you could strike out the
19 transfer --

20 THE COURT: I would agree with you.

21 MR. BURKE: Because I -- that's the provision that
22 identifies the particular shares of GBTC in these two
23 tranches that are the subject of the agreement. So, I don't
24 think any of this would work without that specific
25 designation.

1 THE COURT: But I've got to say, your way of
2 reading this language about representations would make
3 parties hesitant to make representations less they granted
4 legal rights in collateral or other things, it would be a
5 potential minefield, right? Because people say, well, the
6 reason why we have a section on the transfer of the
7 collateral, we have a section about warranties is because we
8 want to make it clear, we're going to give you something.
9 It's ours. That's what the representation is, and the other
10 section is how we're going to do it.

11 And I think this is a not uncommon kind of
12 language. I mean, warranties and representations are common
13 for these sorts of things so that people know what they're
14 getting, and I'm just -- I'm hesitant to look for that to
15 actually tell me to actually control the -- when the
16 security is actually granted here.

17 Again, the language here seems to be pretty
18 vanilla, and the reading you're asking me to give it would
19 seem to require that this language in 5 be a lot more
20 specific as opposed to having me read in and imbue this with
21 language the meaning that you want.

22 Am I missing something about that?

23 MR. BURKE: Well, I guess I can imagine different
24 ways that Section 5 could have been written that would be
25 consistent with the Debtor's understanding of how the

1 security agreement works as a whole.

2 You could have timed these representations and
3 warranties to, you know, so that they are made and become
4 effective at the time you transfer the collateral to Gemini.
5 If that's --

6 THE COURT: But I don't think people would find
7 that acceptable, because they want to know that that for
8 number -- for B that in fact the Debtor owned it before they
9 transferred it.

10 So, I think saying that they only become operable
11 after the transfer I think would make things -- I think
12 you'd have a lot of fights over that, because you'd say,
13 wait a minute, now there's a representation that the Debtors
14 own it, but it was just transferred. So, who actually owns
15 it? And by the way, how do we know that you owned it before
16 you transferred it? Maybe you had possession of it. Maybe
17 you weren't the owner.

18 I mean, this is -- again, this language looks just
19 like one, it's not -- it doesn't seem overly difficult to
20 parse. And so, I'm again having trouble reading it to give
21 your client the rights that you're claiming here, because I
22 don't -- it seems to put a -- the language sort of is
23 straining under the reading that you're giving me.

24 And again, I'm not trying to be -- to brow beat
25 you or be cute. I just want to make sure I understand where

1 you're coming from in terms of understanding the arguments
2 and just being as transparent as I can with what my concerns
3 are.

4 MR. BURKE: No, I understand that, and we welcome
5 hearing your concerns so that hopefully we can try to
6 address them. That's --

7 THE COURT: All right.

8 MR. BURKE: -- totally understood. I think --

9 THE COURT: I think I've asked you a lot of
10 questions. So, I know you have a number of things you want
11 to get to. So, I promise to lay off for a few minutes as
12 you get through your other items.

13 MR. BURKE: So, I'll move on to my next point in
14 just a second, but just before we leave that one, I want to
15 make sure I'm clear about this. You know, there are cross-
16 motions here on the security interest question, and I think
17 for us to prevail on our motion to dismiss the counterclaim,
18 the agreement has to be unambiguous in our favor. For the
19 Debtors to prevail, the agreement would have to be
20 unambiguous in their favor.

21 And I think even if Your Honor doesn't accept our
22 argument that these various contextual indications
23 conclusively adopt our reading of the security agreement.
24 We would submit that they at least, you know, provide the
25 sort of ambiguity that would just allow both claims to go

1 forward here.

2 THE COURT: All right.

3 MR. BURKE: I wanted to make sure I didn't miss
4 that one and then I think the other -- the only other point
5 on the Security Agreement count our security agreement
6 counts is just to make sure that we articulate and you
7 understand our alternative argument, which does sort of take
8 Section 2 of the Security Agreement as the sole determiner
9 of whether an asset becomes collateral.

10 And in our view, the transfer that's been alleged
11 here would qualify under Section 2 of the agreement, because
12 it's a transfer on behalf of GGC, and it's a transfer for
13 the benefit of Gemini and the Earn users.

14 I actually don't -- I'm not sure if the Debtors
15 even dispute the second point, but I think it's, you know,
16 pretty clear that the whole point of this operation was to
17 provide security to Gemini and the Earn users. I don't
18 think it's a stretch to --

19 THE COURT: Well, I don't think anyone disagrees
20 with that. The question is whether your client has a breach
21 of contract claim or an argument that it has security. So,
22 I guess my question is here, when talking about the pledges,
23 the signs, and grants to the agent for the benefit of the
24 agent and the principal lenders, the security interest to
25 all the pledgor's rights to all property from time to time

1 transferred by or on behalf of the pledgor, my question
2 about the transfer buyer on behalf of the pledgor, if it's
3 being transferred from the parent to the pledgor, that seems
4 an odd reading of that paragraph, right? Because one would
5 assume if there's a transfer on behalf of the pledgor, it
6 may be going from a third party to somebody else for the
7 benefit of the pledgor, but if it's being -- if the transfer
8 in your view, the first transfer that's operative, is going
9 from the parent to the pledgor, or GGC, I'm having trouble
10 understanding the -- why that would qualify, because it
11 doesn't, at least as a matter of sort of common sense, seem
12 to easily fall into what you would expect under that
13 language.

14 MR. BURKE: So, I think the key allegation in the
15 complaint here is in Paragraph 39 where Gemini alleges that
16 DCG's sole purpose in delivering the assets that -- the
17 shares to GGC was to facilitate, you know, this further
18 transfer to Gemini and to provide security to the Earn
19 users.

20 And so, I think that's the crucial point to
21 understand here, the --

22 THE COURT: Right. But if I have the agreements,
23 don't I go to the agreements, right? The agreements are all
24 incorporated here. So, I understand that paragraph to not
25 supersede the agreements but rather to be your summary of

1 what the agreements mean, right?

2 In other words, I'm not going to say, well, the
3 agreements say X, but you've alleged in Paragraph 39 that
4 this somehow trumps agreements, and if the two
5 (indiscernible) I'm going to look at the agreements.

6 MR. BURKE: No, that's certainly true, Your Honor.
7 But I think, I guess let me try it this way. Paragraph 39 I
8 think provides the factual allegation that underlies this
9 alternative argument that we've advanced in the briefs here,
10 because it is where we allege that the sole purpose of this
11 transfer was to get the shares to GGC so that they could,
12 you know, facilitate the security for the Earn users, and I
13 think it's --

14 THE COURT: But I agree with -- I mean, so the
15 Debtor needed that transfer to happen so that it had
16 sufficient collateral to pledge as security. So, clearly
17 it's in furtherance of the desire to get your client
18 security. I don't think that that's in dispute, but again,
19 in terms of making it effective, when it's being transferred
20 to GGC, it's not leaving the Genesis family, and it hasn't
21 been sent elsewhere, and it's -- I'm just having trouble
22 understanding.

23 But again, I think I've mentioned this, so I think
24 I have your answer, but I don't know at that point that it's
25 for the -- how it results in a security interest I guess is

1 to put it bluntly.

2 MR. BURKE: So, I guess if it's helpful, I think
3 that the chain of logic from our perspective is the sole
4 purpose is to facilitate this providing the security to the
5 Earn users. That's the factual allegation in the complaint.
6 I think it's a legal characterization that, you know, that
7 factual allegation is consistent with the language in the
8 agreement about a transfer on behalf of GGC.

9 And so, that's the chain of logic underlying the
10 alternative argument. And then also, I think that the
11 transfer would be for the benefit of Gemini and the Earn
12 users, again, because obviously the sort of end goal here
13 was to provide the security for Gemini and the underlying
14 earn borrowing.

15 But also, does that have to be read in the context
16 of -- early in the sentence where it says the pledgor hereby
17 pledges, grants -- assigns and grants to the agent a
18 security interest in the pledgor's right and title?

19 So, doesn't that language dovetail with Section 1
20 in terms of the -- saying that there's -- which uses for the
21 second transfer the reference to the pledgor as opposed to
22 the parent, right? Doesn't that all sort of work together?

23 We've said the pledgor is going to make this
24 second transfer. The Debtors say that's what creates the
25 security interest. This says when the pledgor hereby

1 pledges this stuff, and that, again, it's tied to the
2 actions of the pledgor just like the first initial transfer
3 was when the pledgor makes the transfer.

4 MR. BURKE: So, I think I get off the train I
5 think at the very last stop. The -- Section 2 doesn't
6 require a transfer by GGC. It doesn't require action by
7 GGC. It's also satisfied by a transfer made on behalf of
8 GGC.

9 And our point is under the circumstances that
10 we've alleged where the whole point was to allow GGC to
11 provide security, that the DCG to GGC transfer is properly
12 understood to be on behalf of GGC. And under the language
13 of the agreement, that's enough to trigger the granting of
14 the security interest, or at a minimum, there's sufficient
15 ambiguity that both sides' competing claims should be
16 allowed to proceed here.

17 THE COURT: All right.

18 MR. BURKE: So, I'll turn now to constructive
19 trust if that's okay with Your Honor?

20 THE COURT: Please.

21 MR. BURKE: I think here, the main problem with
22 the Debtor's submission is they're trying to reduce the
23 constructive trust remedy to a rigid checklist of elements,
24 but that's not what New York law provides.

25 The Court of Appeals and the 2nd Circuit have

1 rejected this sort of checklist approach. The Court of
2 Appeals said in the Simmons case that this isn't a rigidly
3 limited doctrine. In Counihan against Allstate, the 2nd
4 Circuit described it as a flexible doctrine.

5 So, I think the key question is really whether an
6 asset-specific equitable remedy is warranted under all the
7 circumstances to prevent unjust enrichment. We shouldn't be
8 looking for, you know, four steps to check off. It's a more
9 holistic inquiry consistent with the equitable nature of the
10 remedy here.

11 So, I think that the first and most important
12 point is unjust enrichment, and that's --

13 THE COURT: Right, but if you said it's flexible,
14 it's hard to imagine that that's first and most important.
15 Is there a case that says that's the most important element?

16 MR. BURKE: I believe the cases say that unjust
17 enrichment is a necessary predicate.

18 THE COURT: Right, so --

19 MR. BURKE: So, it's flexible, but with a
20 necessary element. And so, I think that's -- maybe first
21 isn't right, but I think most important --

22 THE COURT: But does -- if your client -- if I
23 find your client is entitled to the security and it's being
24 -- was unjustly withheld, I get it. If the contract says
25 your client was entitled, didn't get a security interest,

1 should have gotten one but didn't get one, where does your
2 argument stand on that for unjust enrichment?

3 MR. BURKE: So, I want to make sure I understand.

4 THE COURT: Meaning you have a breach of contract
5 claim, but you didn't get a security interest.

6 MR. BURKE: So, I think our unjust enrichment or
7 our constructive trust claim is pled in the alternative, and
8 it could proceed consistent with that determination as to
9 the security agreement claim.

10 And I think the Simmons case that we cited in the
11 papers from the Court of Appeals illustrates that principle,
12 because that's a case where the Court of Appeals recognized
13 that the insolvency of a potential defendant where you would
14 have a legal remedy is a reason to conclude that the legal
15 remedy would be -- let me just make sure I got the language
16 right -- fruitless and worthless. So, I --

17 THE COURT: But would it be fruitless here? I
18 mean, or worthless. Wouldn't it mean that you have an
19 unsecured claim and that you're going to recover the way all
20 the other -- or could recover the way all the other
21 unsecured creditors would recover for breach of contract?

22 MR. BURKE: So, I think that that's not correct,
23 and it actually sort of circles back to unjust enrichment.
24 So, I think these elements do sort of blend and merge
25 together.

1 The -- there is a common fact pattern that many,
2 if not all, of the Debtors, depositors, and lenders have
3 experienced here, right? All of the depositors I think
4 would say they were defrauded into lending or keeping their
5 loans outstanding. Gemini and I think all of the ear users
6 agree with that.

7 And so, that is a -- you know, that is a common
8 fact pattern, and it's an injury that is widely shared by,
9 you know, if not all of the creditors agree, many of the
10 creditors in this case.

11 What's different here is that Gemini has -- Gemini
12 and the Earn users have been injured by a separate and
13 distinct injury and malfeasance by the Debtors in the sense
14 that if there's, you know, specific assets that as I noted
15 at the outset of my remarks wouldn't even be in the Debtor's
16 hands at all but for this arrangement, that the Debtors
17 engineered and then, you know, frustrated by intercepting
18 the additional GBTC shares.

19 And so, I think that's the distinction here
20 between the sort of (indiscernible) case that First Central
21 and all of those other decisions address where the court in
22 bankruptcy has a legitimate concern that recognizing a
23 constructive trust as to one asset is going to earmark that
24 asset for one creditor, right, and correspondingly deplete
25 the resources available for the other creditors, that, you

1 know, is generally true, but it's also totally clear that
2 First Central and those related cases, they don't, you know,
3 absolutely bar the position of a constructive trust in a
4 bankruptcy case. The Powers Appliance case from the 2nd
5 Circuit --

6 THE COURT: Well, but I guess I'm losing what
7 you're trying to -- what you're asking me to divine from
8 this. Are you saying that Gemini is -- the Debtors have
9 said Gemini is -- the recovery would go to Gemini. It
10 wouldn't go to other creditors, and therefore this falls
11 squarely inside those line of cases that make it -- that
12 support the Debtors.

13 You're mentioning the Earn users, but I'm not
14 quite sure what connection you want me to bring. Is Gemini
15 getting this money than to give to the Earned users. Is
16 what -- I mean, what is it that makes -- and whether it's
17 Gemini recovering separately apart from the Earned users or
18 the Earn users, then you're still benefiting a certain
19 subset of the bankruptcy case, right?

20 MR. BURKE: Right, and --

21 THE COURT: So, I guess I'm just -- if you could --
22 -

23 MR. BURKE: I apologize. I probably ran a few
24 different issues together. I tried to be --

25 THE COURT: All right. Yeah. No, that's why it's

1 -- so, I -- but I want to make sure I understand where
2 you're coming from on this.

3 MR. BURKE: So, I think one response is -- I
4 didn't mean to sort of draw a distinction between Gemini and
5 the Earn users.

6 Gemini is acting in this case as agent for the
7 Earn users. The whole point of bringing this case was to,
8 you know, pursue the interests of the Earn users by
9 vindicating the property rights in the additional GBTC
10 shares and then also dealing with the initial collateral
11 that's sort of off on a different procedural path here.

12 So, I'm not trying to suggest that there's some
13 distinction between Gemini's interests and the Earn users'
14 interests --

15 THE COURT: No, I guess I'm a little confused as
16 to -- I haven't seen anything in the record that says Gemini
17 is going to recover this and distribute it to the Earn
18 users. I understand that this security was set up because
19 Gemini had this Earned user program.

20 But again, I don't know that it matters in the
21 sense that -- whether they're -- Gemini is going to keep it
22 or whether the Gemini is going to give it to the Earned
23 users. It's still a subset of the unsecured creditor pool.
24 And so, I guess I'm trying to understand what that would
25 mean if --

1 MR. BURKE: Right, so I do want to make sure I
2 respond to that concern as well.

3 THE COURT: Yeah.

4 MR. BURKE: And the -- I guess the first response
5 is that the dynamic that you just identified, which is an
6 important one to consider, is going to be true in every
7 bankruptcy case whenever a plaintiff seeks to impose a
8 constructive trust on assets that would otherwise be
9 available for distributions to unsecured creditors.

10 So, if it were the case that it is inherent --

11 THE COURT: I would agree with you. It's -- I
12 think obviously this doctrine comes up in a lot of non-
13 bankruptcy instances. And so, I think it's a, much as you
14 said, a factor but not a -- it's not a -- dispositive of
15 anything.

16 MR. BURKE: Right. And so, I think the next step
17 is --

18 THE COURT: But you would agree, though, that that
19 factor seems to counsel against your client here, right, in
20 terms of the way bankruptcy works.

21 MR. BURKE: Well, I -- so, I think there is a
22 general proposition that is recognized in cases like First
23 Central and a number of other cases that the Debtors have
24 cited where Courts are cautious in the bankruptcy setting
25 before recognizing a constructive trust, and there is this

1 idea that -- where the sort of only effect of the remedy
2 would be to benefit one creditor at the expense of the
3 other, that maybe -- what's the right way to say it? Maybe
4 less unjust or something in the bankruptcy context vis-à-vis
5 other circumstances.

6 But I don't think that principle actually applies
7 here. And -- but I think the first --

8 THE COURT: Well, I guess my question is why not?

9 MR. BURKE: Well, if I could, I just want to make
10 the preliminary point that it can't be the case that that
11 principle applies across the board in bankruptcy cases
12 because we know --

13 THE COURT: No, I agree it's not dispositive, but
14 it seems pretty clear it's a factor in the constructive
15 trust analysis as cases have looked at. So, but then you
16 said, but it doesn't apply here, and that's where I'm sort
17 of wondering why.

18 MR. BURKE: Right. And so, I think the key point
19 there is that we're talking about assets that wouldn't even
20 be held by a Debtor at all but for this malfeasance that
21 underlies the unjust enrichment theory and the constructive
22 trust --

23 THE COURT: Well, but I assume we're talking about
24 the circumstance. If your client prevails and has a
25 security interest, then the constructive trust issue we

1 could reach, might not reach, depends on how you look at it.
2 But if you reach the constructive -- and so, I -- the
3 colloquy I'm having with you now is really what happens in
4 the constructive trust theory in the context that you don't
5 find a security interest, and then it means that it actually
6 is property of the estate, and you're asking to impose a
7 constructive trust, and I'm having trouble understanding why
8 that doesn't at least implicate the concerns identified by
9 the bankruptcy courts in terms of the sort of recovery of
10 other creditors of the estate.

11 MR. BURKE: I guess I don't want to fight on
12 whether or not the concern is implicated versus
13 distinguishable. I think the key point is that the assets
14 that would be, you know, subject to the constructive trust
15 are assets that would not have been on the balance sheet
16 here but for this malfeasance.

17 And so, it's --

18 THE COURT: But you can say that about any
19 creditor, because all creditors are entitled to be paid. I
20 mean, that's the reason why I think -- why you have in
21 constructive trust that concern raised, because there are
22 all sorts of creditors who say you were supposed to pay me.
23 And so, to quote the (indiscernible), what's so particular
24 with you, right? And that's the question. And so, and
25 that's what I'm trying to get at, why that concern operates

1 differently in the context of this case.

2 MR. BURKE: And I -- the best way I can articulate
3 it is I guess that in general, creditors of a bankrupt
4 Debtor don't have an asset-specific claim on any particular
5 assets, and that's what it means to be an unsecured
6 creditor, right?

7 THE COURT: Right.

8 MR. BURKE: And they may say I have been harmed
9 because I was supposed to be paid 100 cents on the dollar
10 and instead I'm getting only 50 cents or 20 cents, or
11 there's nothing left for me. And that -- you know, that is
12 a harm, but it's not the kind of harm that kind of is
13 sufficient to trigger the position of constructive --

14 THE COURT: So, let me just restate to make sure I
15 have this right. So, your -- the premise for saying this
16 isn't like those other cases, because you say, well, the
17 agreement clearly contemplates a security interest, and even
18 if that security interest wasn't properly effectuated such
19 that it actually exists, there's no -- the contract provides
20 for it and it didn't happen, which puts your client, Gemini,
21 in a different position from other folks and therefore makes
22 this concern in these cases less applicable or not
23 applicable at all to your situation.

24 MR. BURKE: So, I think that logic would be
25 sufficient to rule in our favor, and I think it's correct.

1 I think that what you just described is very similar to the
2 circumstances that the 2nd Circuit dealt with in the
3 Howard's Appliance case.

4 That was a case where there were assets that were
5 subject to the security interest. They were -- as I
6 understand it, they were moved by the Debtor out of the
7 warehouse where the security interest would have been
8 perfected in violation of the agreements between the Debtor
9 and the creditor, and the Court of Appeals said, you know,
10 it's not under the UCC or whatever the governing law would
11 have been. It wasn't a properly perfected security
12 interest.

13 But because the reason that it wasn't perfected
14 was this sort of fraudulent malfeasance by the Debtor, those
15 were the circumstances that gave rise to a constructive
16 trust. And I think the key factor there is we're talking
17 about assets and particular property, and that helps to
18 distinguish it from the (indiscernible) case where we're
19 talking about, you know, similarly situated creditors who
20 are all just being paid less than full on their claim.

21 I think our case is actually stronger than that,
22 though, because we're not talking about a security interest
23 that was granted in property that was already on the
24 Debtor's balance sheet. That is easier to think of as sort
25 of the one creditor, sort of the favorite creditor holding

1 assets out of the estate away from the other creditors.

2 Here, we're talking about assets that are there on
3 the balance sheet only because of this arrangement with
4 Gemini and the Debtor's malfeasance and refusing to comply
5 with their obligations.

6 THE COURT: Well, I think I understand your first
7 point that the Debtor -- in your view, it's the Debtor's
8 misbehavior that led to it not being perfected and that
9 supports the imposition of a constructive trust.

10 The notion that the funds are only there because
11 of this long-standing relationship, that seems a point that
12 could happen with any creditor, right? People have
13 relationships, whether you're a vendor or whether you're any
14 of the folks who invested in Genesis.

15 So, I don't know that that's -- I don't know that
16 that distinguishes this case, but I understand your point is
17 that -- to be that the reason it wasn't perfected as to
18 these specific assets is because of the wrongdoing -- the
19 alleged wrongdoing by the Debtor, and that that changes the
20 calculus for a constructive trust.

21 MR. BURKE: And I think there's a distinction.
22 There may be many cases where you could identify the
23 particular asset that is there, you know, on the Debtor's
24 balance sheet only because of a relationship with, you know,
25 some particular creditor.

1 I don't think standing alone that would be
2 sufficient to recognize a constructive trust. I think there
3 actually -- you know, there needs to be some wrongdoing on
4 the part of the Debtor that sort of --

5 THE COURT: Well, I don't know that those two
6 things by themselves necessarily justify the imposition of a
7 constructive trust, because if the act of not paying is the
8 wrongdoing, then every creditor in every bankruptcy has the
9 right to impose a constructive trust, and that can't be
10 right.

11 MR. BURKE: I agree. That can't be right, and
12 that's not our position here. The -- it's the wrongdoing in
13 bringing the assets -- you know, sort of intercepting the
14 asset. That is how I think about it here. You know, it's
15 not like they came out of Gemini's pockets, but they were --
16 the assets were intercepted on the way to Gemini, and that
17 was, you know, what everybody understood was supposed to
18 happen.

19 And those are assets that, you know, could have
20 been transferred directly to Gemini, right? Had Gemini
21 known that the Debtors were going to behave in this manner,
22 you know, they might have, you know, come to a different set
23 of mechanics to avoid this possibility.

24 And so, I think all of these together, there's a
25 combination of malfeasance as to a particular property,

1 malfeasance that results in that property ending up on the
2 balance sheet when it wouldn't have been there anyway, and I
3 think it's different from the sort of (indiscernible) harm
4 that every unsecured creditor experiences that they're just
5 not being paid in full because of the filing in the
6 bankruptcy petition.

7 THE COURT: All right. Anything else on
8 constructive trust?

9 MR. BURKE: I just want to briefly touch on the
10 Debtor's remaining two arguments, the fiduciary or
11 confidential relationship and then this idea that the -- you
12 know, you need to identify assets that were transferred by
13 the plaintiff.

14 I think the common theme for both of those two
15 arguments is that they are, you know, repeating this
16 checklist flaw that identified at the outset of this section
17 --

18 THE COURT: Well, but they're referencing case --
19 they're referencing factors that have been considered by
20 Courts. So, I mean, you said it's a flexible test. So, I
21 don't know that you can say it's a flexible test and then
22 say that they can't cite cases that are cited by other
23 courts as significant.

24 I mean, you can weigh them differently, I suppose.
25 But there are many multifactor tests in the law. We'd all

1 be lost without multifactor tests, I think. So --

2 MR. BURKE: That's entirely fair, and I don't
3 begrudge the Debtors citing these cases. I think our point
4 is that, you know, stepping back for a minute, this is
5 supposed to be a flexible doctrine, that it should be
6 examined, that the question should be examined holistically.

7 The question -- the core question is whether
8 Gemini and the Earn users have an equitable entitlement to
9 particular, you know, asset-specific remedy, and I think the
10 confidential or fiduciary relationship, this idea of, you
11 know, assets that were transferred from the plaintiff, those
12 are both common circumstances in which it is, you know,
13 appropriate to impose that asset-specific remedy, but it
14 doesn't mean that those are, you know, limitations on the
15 doctrine.

16 And I really -- I think in particular on the
17 concept that constructive trust is appropriate only when the
18 asset was transferred from a plaintiff, I just don't see the
19 grounding in any coherent theory of what this remedy is
20 there for. I don't think it's any less unjust to have, you
21 know, a defendant trick the plaintiff into handing over its
22 own funds rather than what we have here where the defendant
23 sort of -- the malfeasance is intercepting the funds on the
24 way to -- the assets on the way to the plaintiff.

25 THE COURT: Well, I think I have a sense of what

1 the doctrine is most classically used for, and that's why
2 the fiduciary aspect comes in where someone is supposed to
3 be acting on your behalf and is not.

4 And so, you may not have a contractual provision
5 that says they can't do what they did, but you had an
6 element of trust that should have precluded the actions that
7 they took.

8 And so, that seems to be -- the fiduciary aspect
9 seems to be a pretty significant aspect of the cases in the
10 flexible approach.

11 So, what's -- but let me ask you about the --
12 there's a cite or an argument that you -- the constructive
13 trust claims are equitable and are generally not permitted
14 where a valuable -- a valid written contract exists.

15 And so, it seems like everybody's arguing about
16 what the contract means. Nobody is arguing that it doesn't
17 exist. And so, what's your take on that?

18 MR. BURKE: So, I think our best case is the
19 Simmons case from the New York Court of Appeals, which
20 recognizes that the -- the insolvency of the potential
21 defendant on a, you know, legal claim for damages is a
22 reason to conclude that the contractual remedy is fruitless
23 and isn't adequate.

24 So, the -- I think the -- this inquiry into
25 whether there is a governing contract is really a specific,

1 as I understand it, a specific instance of the broader
2 principle that, to have an equitable remedy, you have to
3 demonstrate the inadequacy of your legal remedies.

4 And I think the Simmons case holds that where you
5 might have a legal remedy under the contract, but the
6 potential defendant is insolvent and wouldn't be able to
7 satisfy your legal claim. That's a circumstance in which it
8 would be appropriate to impose a constructive trust. I
9 think that Howard's Appliance case is another one to look
10 at.

11 THE COURT: And what's the theory behind that,
12 that you can't recover from the Debtor but you could recover
13 from these assets, right?

14 MR. BURKE: Right. I mean --

15 THE COURT: But I'm wondering how that would apply
16 in this circumstance. There's a bankruptcy estate, and
17 there are assets for recovery. And so, it makes -- I can
18 understand the carve-out where you say you're judgment
19 proof. We -- you can't get blood from a stone. There's
20 nothing there.

21 But that's not true here. There's a breach of
22 contract claim that you can have and can recover as an
23 unsecured creditor. So, how does the -- what's your
24 response to that concern?

25 MR. BURKE: Well, I think the key point is that

1 the breach of contract claim, you know, I guess that --
2 trying to spin this out, I think it would be a claim for,
3 you know, the damages from failure to transfer the
4 collateral on when they were supposed to do so promptly.

5 But I think that's sort of a piece with the
6 existing claim that the lenders -- Earn lenders already have
7 for the assets that they loan to Genesis, you know, to have
8 the --

9 THE COURT: Well, but isn't that a question of
10 what the measure of damages would be under those
11 circumstances, right? So, you can't double recover damages,
12 but you could say we're supposed to get this pledged, which
13 meant we should have had a minimum of that recovery, and if
14 we're only going to get this amount of recovery in the
15 bankruptcy, then the delta would be how we've been harmed by
16 the failure to actually carry out the security agreement.

17 Well, I guess --

18 THE COURT: Sorry, that's a lot. You don't
19 necessarily have to answer. I'm just thinking out loud.

20 MR. BURKE: Well, I think the -- at least the way
21 I think about it, Your Honor, is that, you know, if we had
22 the collateral and had been able to foreclose on it, it
23 would have satisfied the antecedent debt obligations.

24 And so, I guess that's where I'm coming from, that
25 the legal claim for breaching the security agreement seems

1 to sort of overlap with the pre-existing, you know, claim
2 that -- you know, of the lenders for the loan assets.

3 THE COURT: I would agree with that.

4 MR. BURKE: And so, I think that's why the -- it
5 seems appropriate to analogize it to that Simmons case and
6 to say, well, you know, there's not really any effective
7 remedy, you know, under the security agreement, if you've
8 concluded that there was no transfer of the security
9 interests and it's just an unsecured claim for, you know,
10 reaching the promise to transfer.

11 And so, you know, we would fall back to the --
12 that equitable doctrines and constructive trust, and I guess
13 the other case I wanted to cite to you is the Howard's
14 Appliance case from the 2nd Circuit.

15 That was a case, as I mentioned, that has sort of
16 similar fact patterns where the malfeasance led to -- the
17 malfeasance breaching an agreement with the creditor led to
18 an inability to perfect the security interest, and the 2nd
19 Circuit said those were circumstances where it was
20 appropriate to impose a -- I suppose you could have said in
21 that case you should have sued the Debtor for, you know,
22 breaching the contract by moving the inventory from one
23 warehouse to another.

24 But that's not what the 2nd Circuit said. And I -
25 - just to be clear, that's not a case where any of these

1 issues were actually, you know, argued and decided by the
2 Court. I cite that only to provide an example of a case
3 where the 2nd Circuit didn't even seem to think there was an
4 issue here that you could have a claim based on a breach of
5 that agreement to keep the inventory in one place versus
6 another.

7 And you know, although there might have been some
8 legal remedy that could have been an unsecured claim for
9 bankruptcy, the Court nonetheless thought it was appropriate
10 to impose a constructive trust.

11 THE COURT: All right.

12 MR. BURKE: I should note, that was a New Jersey
13 law case, I believe, but I don't think this principle we're
14 talking about differs from state to state, because I think
15 it's the broader principle that the legal remedy displaces
16 the equitable remedy that we're really talking about. And
17 so, I think that's at least persuasive authority under the
18 circumstances here.

19 THE COURT: All right. Counsel, what else on
20 constructive trust or anything else we should discuss?

21 MR. BURKE: I think that's it on constructive
22 trust unless the Court has any further questions. I want to
23 move on to the avoidance claims before, you know -- just a
24 couple of small points to clean up at the end.

25 THE COURT: Well, since we're talking about the

1 other claims where we get to avoidance, the other claims
2 have the other two defendants, so -- that are the subject of
3 the motion. So, maybe we should jump in and address those,
4 and then we can pivot to the avoidance claims.

5 MR. BURKE: Sure. I don't think there's much
6 daylight, and I think, Your Honor, you articulated what's
7 going on here, you know, earlier today, I don't know what
8 time that was, that why are those entities, defendants,
9 here? It's a protective measure, right? We don't have, you
10 know, x-ray vision to know exactly, you know, where the GBTC
11 shares might be held at any moment.

12 You know, the Debtors have filed in this case cash
13 and coin reports that treat the three Debtor entities, you
14 know, as, you know, consolidated entity for purposes of
15 those reports.

16 So, that's why they're defendants. We think it's
17 appropriate as a protective measure, but I'm not sure -- I
18 guess the only other point is I'm not sure much turns on
19 this, in any event.

20 Like, all of these claims relate to particular
21 property. They're sort of in rem declaratory judgment
22 claims. And so, I mean, it seems almost academic to me
23 whether or not, you know -- which of these Debtors that file
24 pleadings through the same counsel or defendants in the
25 case.

1 THE COURT: All right.

2 MR. BURKE: So, is it okay if I move on to the
3 (indiscernible) issues?

4 THE COURT: Please.

5 MR. BURKE: I guess I think I understood or heard
6 from Your Honor the concern that by moving to dismiss here
7 we're trying to sort of move up factual issues that might be
8 more appropriate for the summary judgment stage. So, I want
9 to try to respond to that concern.

10 THE COURT: All right.

11 MR. BURKE: One -- I guess one overall point or
12 starting point is just to emphasize that, yes, the safe
13 harbor issues can be factually intensive, and in some cases,
14 they may require discovery and very fine-grained factual
15 judgments, but that's not universally true.

16 We cited at Page 12 of our motion to dismiss brief
17 cases where this issue was adjudicated as a matter of law
18 and a motion to dismiss including the Enron against Bear
19 Stearns case. So, I don't think there's any procedural
20 impropriety in trying to address issues where it's possible
21 to do so at the motion to dismiss stage, including, you
22 know, relying on judicially noticeable information. That's
23 what happened in the Enron against Bear Stearn's case. If
24 you -- you know, there's public filings and SEC reports that
25 informed the Court's decision on a motion to dismiss under

1 the safe harbor there.

2 So, I think -- I guess one other preliminary point
3 is just to come back on the Three Arrows claim objection
4 that we talked about earlier today. Just I don't
5 (indiscernible) actually relevant to our bottom-line
6 conclusion here because we're not invoking the estoppel
7 doctrine, but it's worth noting if you look at the Three
8 Arrows claim objection, I think it's Docket 658 on Page 17,
9 that's the argument by the Debtors that there was no factual
10 allegations as to Holdco, but the Debtor didn't press that
11 same argument with respect to GGC.

12 In the Three Arrows setting, GGC and GAP were
13 defined together as Genesis, and as I read their pleading,
14 the rest of the arguments other than this Page 17, you know,
15 Holdco didn't do anything argument, they're pressed on
16 behalf of both GAP and GGC, so I just --

17 THE COURT: So, if you're not relying on judicial
18 estoppel, what are you relying on? There's the classic
19 you've said this before and you can't escape your earlier
20 position. There's res judicata. here's collateral
21 estoppel. There's judicial estoppel, and there's law of the
22 case.

23 So -- or maybe there's something else. So, what's
24 the legal doctrine under which, in your view, I can rely on
25 those pleadings?

1 MR. BURKE: So, I'm not asking you to rely --
2 that's why I -- you know, it's -- I wanted to correct the
3 record about this point, but you know, it --

4 THE COURT: Well, but you mentioned them as saying
5 this is what the Debtors -- this is the Debtor's own
6 statement about X, Y, and Z, so Judge, that checks the box
7 on one of the safe harbor requirements. So, how do I get
8 there in terms of --

9 MR. BURKE: Right. So, we --

10 THE COURT: -- relying on those pleadings?

11 MR. BURKE: I think the answer to that concern is
12 we've pressed the same arguments sort of in short form in
13 our own motion to dismiss, and the reason we did it in short
14 form is that for every one of those propositions we could
15 say, and the Debtors agree with us, see paragraph whatever
16 of the Three Arrows claim objection.

17 But you know, we have a paragraph in there that
18 explains why these -- the lending arrangements that we're
19 talking about satisfy the four-part test for a forward
20 contract under the code and how that links up with the rest
21 of the definitional provisions, et cetera, et cetera.

22 So, I think that the conceptual point is we've
23 made the arguments citing the relevant legal materials.

24 We've also said, by the way, Judge, the Debtors --

25 THE COURT: But how do I rely on it? So, putting

1 aside the doctrines that we just mentioned, there certainly
2 is the informal doctrine of I have some skepticism, because
3 over here you argued this. That's not a legally cognizable
4 doctrine.

5 MR. BURKE: We have some (indiscernible) that do,
6 but --

7 THE COURT: Right? But it is one of those things
8 that people confront when they say, well, this is how you've
9 looked at the world before, and it affects people's -- the
10 credibility of positions, perhaps, and shades things, but
11 it's not a -- it doesn't foreclose something. It doesn't
12 say that box is definitively checked. It's a -- in the
13 grand, overall weighing of things, it's in there.

14 MR. BURKE: It's (indiscernible).

15 THE COURT: But for this, on a motion to dismiss,
16 you know, the idea is that I need the allegations -- I take
17 the allegations as true, but to rely on the safe harbors, I
18 need to meet certain requirements, and this can get very
19 tricky. I've had to do this in other cases in a very thorny
20 record.

21 And so, the -- in order to check that box, you're
22 citing this, and the Debtors are saying, Judge, you can't
23 rely on that here. I'm not hearing you disagree with that
24 in terms of some sort of estoppel or preclusive doctrine.
25 So, how do I get there?

1 I mean, it may be a good argument in your favor if
2 we ever have to argue it on, like, summary judgment, but how
3 it -- on a motion to dismiss is it something that enters the
4 conversation?

5 MR. BURKE: Sure. So, I guess there are a couple
6 of parts to the argument, but I guess the first point is
7 this is how we put it in the reply, and I think this is in
8 part responsive to your question here.

9 The estoppel goes to whether they could disavow
10 their earlier positioning now. And as I said, we're not
11 invoking the estoppel doctrine here. So, maybe it's open to
12 them to disavow their prior position, but I don't think
13 they've done so, and I think they actually have to do so by
14 joining issue here --

15 THE COURT: Yeah, but if you want to prevail,
16 right, you have -- it's an affirmative defense, you have the
17 burden. And so, I think they just did and said, Judge, it
18 can mean a lot of different things under the circumstances.
19 We never got to litigate it, and there's a lot of reasons
20 why you should discount that as a clear, unambiguous
21 statement of the position of the Debtors.

22 And so, I think they have disavowed it, but I
23 don't know that they have an obligation to do so if you've
24 got to prove it. I need to check the box. So, if there was
25 an allegation --

1 MR. BURKE: Yeah, I --

2 THE COURT: -- in the complaint that you said as
3 for the safe harbors, such -- so and so, blah, blah, blah,
4 blah, blah, therefore is a forward contract, and their
5 answer said admitted, touchdown, right? That checks that
6 box.

7 But this is awfully fuzzy to use a non-legal term,
8 and I'm wondering how I can consider it in the context of a
9 motion to dismiss. I don't think the, well, we mentioned it
10 and they didn't really disagree with us, that's -- I don't -
11 - that doesn't -- I don't think that gets me there.

12 MR. BURKE: Well, I think --

13 THE COURT: At least today.

14 MR. BURKE: I hope it does.

15 THE COURT: But under what doctrine?

16 MR. BURKE: Well, we articulated a legal argument
17 in our motion, right, that the sort of core issue here is
18 whether these lending arrangements are properly
19 characterized as forward contracts for purposes of the
20 Bankruptcy Code.

21 That was our argument. We cited the relevant
22 statutory provisions in the case law. And also, we said by
23 the way, the Debtors agree to this in this other pleading,
24 but don't focus on the last one, focus on the first two, the
25 sort of ordinary legal argument.

1 I think we've articulated that argument. It's
2 incumbent on the Debtors to explain somehow --

3 THE COURT: But it's an affirmative defense, which
4 you have to prove, and so you have to prove it here in the
5 context of construing all the allegations in their
6 counterclaims as true and showing that the rest of the
7 record of what I can take judicial notice of is -- I can
8 actually properly take judicial notice.

9 And judicial notice, people get a little expansive
10 with it, it's really not supposed to be anything that's
11 expansive, right? It -- because judges shouldn't be in the
12 business of saying, well, this is a hotly contested set of
13 facts, so I'm going to take judicial notice. That's not --
14 that's where the doctrine really falls apart and puts Courts
15 in places that nobody wants us to be.

16 So, it's really got to be a lay-up for judicial
17 notice, and I have the Debtors saying, Judge, we disagree
18 that you can consider this and for the following reasons.
19 And so, that's sort of where I find myself. I'm just -- and
20 that's why I keep asking about a doctrine, whether there's
21 something that says under these circumstances, a Court can
22 consider this for purposes of a dismissal motion as
23 categorically established, and that's sort of where I am.

24 I understand as a practical matter in terms of
25 persuasive, Judge, they don't really seem to say a whole lot

1 that tells me that we're wrong about this, but they raised
2 some questions, but I don't -- isn't it their obligation to
3 come ahead and whatever, but I don't think for this posture
4 -- the question is for this posture with a burden on you as
5 an affirmative defense whether it's something that can be
6 addressed here today.

7 MR. BURKE: Right. That's -- that concern makes
8 sense to me. I guess that one of the key points here is I
9 think that characterization of these arrangements I think is
10 ultimately a legal question, not a factual one.

11 And so, I don't -- I guess the burden of proof and
12 the -- you know, the ability to bring evidence to bear on
13 those particular issues where we, you know, advanced a legal
14 argument in our brief I don't think is the right way of
15 thinking about it, right? I think --

16 THE COURT: Well, but you still have to -- even if
17 some of these requirements are not particularly
18 controversial and are sort of -- kind of check the box, the
19 two-day requirement and things like that, you still have to
20 establish them. And so, that's -- and that's what I think
21 the argument is, that you can't on this factual record --
22 and I don't doubt under the right circumstances, you may be
23 able to consider it on a motion to dismiss, but I suspect
24 those cases deal with an instance where everything has been
25 distilled factually and nobody disagrees on sort of the key

1 aspects and is fighting over the legal significance of one
2 or two things. I could be wrong.

3 MR. BURKE: Well, I guess, I think the -- I guess
4 the key point is it's just -- it's hard for us to identify
5 based on the Debtor's submission here what the actual
6 factual issues are that they're pointing to. Is it the two-
7 day thing? Is it the characterization of certain assets as
8 commodities versus something else, right? You know, I don't
9 think they've really argued that issue here, and that's one
10 of the issues where I say maybe they could disavow their
11 prior position, but they haven't really --

12 THE COURT: Well, so the initial transferee I
13 think was one that was mentioned, right?

14 MR. BURKE: Okay. And I think on that one, I
15 think that's just -- that issue is logically irrelevant
16 here, because the relevant claims are -- you know, there are
17 counterclaims asserted against Gemini. They allege in Count
18 7, Counterclaim 7, that Gemini was the initial transferee,
19 right? So, that's the claim that's in front of the Court
20 here, and that's the claim as to which, you know, we need
21 to, if possible, you know, get a determination on these safe
22 harbor issues.

23 The suggestion that there might be other claims
24 against other people who may or may not qualify for the safe
25 harbor I think is just -- it's irrelevant to whether the

1 claim that they've actually pled against Gemini should be
2 permitted to go forward.

3 THE COURT: All right.

4 MR. BURKE: I mean, I guess in the event that we
5 are -- that Gemini was a conduit rather than an initial
6 transferee, that is a -- that's a defense to the claim for
7 Gemini, but I don't think they can point to a different
8 failure point for their claim and say, well, that's a reason
9 that you can't articulate -- or you can't adjudicate this
10 other defense at this stage.

11 So, I think unless you have other questions about
12 the avoidance issues, I think I can leave it there. On the
13 property of the estate claim, you know, I think when you
14 look at all of the circumstances here, the arrangement that
15 is embodied in the second amendment looks very close to the
16 escrow (indiscernible) conduit examples that we've cited in
17 the briefs.

18 I think it's, like, hard to understand how what's
19 happened here differs from those situations, and that's the
20 basis for our argument there. I mean, I'm content to leave
21 that mostly to the briefs unless you have questions there.

22 THE COURT: No, that's fine.

23 MR. BURKE: I did want to respond, and then I can
24 finally wrap up. I appreciate your patience and indulgence,
25 Your Honor. I wanted to respond to a few points that Mr.

1 Shore made on behalf of the UCC here.

2 The -- you made a number of arguments that echo
3 points that the Debtors made in their brief about the
4 ability to enforce the security agreement, how that bears on
5 whether or not the security interest was there in the first
6 place.

7 I think all of that is sort of intent-type
8 extrinsic evidence that isn't really properly in front of
9 the Court at this stage. If we're getting to that, it means
10 that the words of the contract are ambiguous, and maybe Mr.
11 Shore has a point, maybe he doesn't, you know, in terms of
12 the practicalities and the intent, et cetera, but I don't
13 think that's a topic for today's proceedings.

14 The only other point I wanted to address from Mr.
15 Shore's remarks was his invocation of this secret lien idea
16 and the idea that, you know, because of the way things
17 transpired here, it would be inappropriate to recognize a
18 constructive trust on these claims.

19 I think Mr. Shore sort of misunderstood or
20 misdescribed the relevant chronology here. The -- these
21 assets that we're talking about here, the additional GBTC
22 shares, according to the Debtor's allegations, they didn't
23 even arrive at Genesis until after Genesis had shut down its
24 lending and borrowing business back in November.

25 So, this isn't a case where other creditors would

1 have been lending into the business on the basis of GBTC's
2 shares that were on the balance sheet, and you know, were
3 subject to a secret property interest for Gemini.

4 THE COURT: Well, I took his comment to be a
5 general policy argument saying that when you bargain for
6 security interests like this where possession is relevant
7 and thus the second transfer, that it's important because
8 what it does is take the asset off the books and therefore
9 people won't look at the books and rely on the books with
10 the assets still there but somehow isn't property of the
11 estate. And so, I understood it to be a policy argument
12 that way.

13 MR. BURKE: I think that's an argument that would
14 have general applicability in some cases. My point is
15 narrower, that the chronology here is inconsistent with that
16 concern, because by the time these shares ended up at
17 Genesis, they had already shut down their lending and
18 borrowing business, so.

19 THE COURT: Well, I think the notion is that for
20 that kind of a policy argument, you're not really as
21 concerned about how it's going to play out in a particular
22 case, but that there's a -- that the way the law works
23 dovetails with the policy argument in the sense that this is
24 why it works this way, because it's important, and however
25 the chips fall in a particular case is what it is, but

1 that's why these concerns are what they are. But again, I -
2 - that's how I understood it, and I don't know if you have
3 anything to say about that.

4 MR. BURKE: I think that's the right way of
5 thinking about it. If you are faced with construing a
6 statute that has to apply across the board, or if you would
7 think about various potential applications, think about the
8 policy implications, and that would help you arrive at, you
9 know, a sensible reading of the statute, because it has to
10 apply to all of those circumstances.

11 At least as I understood Mr. Shore's remarks, this
12 portion of it was intended to be relevant, at least in part,
13 to the constructive trust claim, and I don't think the same
14 concerns apply there, because that is, you know, equitable,
15 case-specific, flexible doctrine, and it's totally
16 appropriate to look at the particular circumstances of the
17 case rather than trying to implement sort of across-the-
18 board policy judgments that might make more sense in other
19 cases.

20 THE COURT: All right. Thank you very much.

21 MR. BURKE: So, I think that's all I have unless
22 you have further questions.

23 THE COURT: I do not.

24 MR. BURKE: I don't want to collect the various
25 counts, because that confuses me. I'd urge you to deny

1 their motion and grant our motion.

2 THE COURT: All right, fair enough. That's a
3 perfectly fair way to summarize it.

4 MR. BURKE: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 All right. So, let me hear a response from the
7 Debtor. And I'll take this opportunity to thank counsel for
8 engaging back and forth as I wrestle with these issues. I
9 appreciate it. It's very helpful, even again if it means
10 that people have to stray far field from their scripts, but
11 it really is a very helpful thing to have an evolving, live
12 argument.

13 So, Mr. Barefoot?

14 MR. BAREFOOT: Thank you, Your Honor. Luke
15 Barefoot from Cleary Gottlieb for the Debtors. Three
16 extremely brief points, one on the security interest
17 contract question and two on constructive trust.

18 First, on the security interest grant question
19 under the language of the contract, I wanted to follow up on
20 the discussion that you had with Mr. Burke about Section 1
21 of the second amendment where it specifically describes the
22 first step of the transfer as being made from DCG to the
23 pledgor and then contemplates that the pledgor, which of
24 course is GGC, would make the second step of the transfer
25 into Gemini's GTC account.

1 That -- we did not discuss this previously, but
2 that description of GGC as the pledgor making that second
3 transfer is inherently incompatible with the alternative
4 argument that they've made that the transfer was made --
5 that the transfer from DCG was being made on behalf of
6 Gemini.

7 If you were going to rely on Section 2 of the
8 security agreement to say, as they've said, that the
9 transfer from DCG to GGC was made on behalf of GGC, you
10 never would have drafted the operative transfer language to
11 describe GGC as a pledgor.

12 On a related point, Your Honor, they have not
13 alleged that -- anywhere that the transfer from DCG was made
14 on behalf of GGC.

15 THE COURT: Right.

16 MR. BAREFOOT: And Mr. Burke went through
17 Paragraph 39 with you of the complaint. That paragraph does
18 allege that the sole purpose of the transfer was to have GGC
19 in turn provide those shares to Gemini, but it does not
20 allege that the transfer was made on behalf of the GG -- the
21 transfer to GGC was made on behalf of GGC.

22 Turning to the constructive trust arguments, Your
23 Honor, Mr. Burke repeatedly talked about and their briefs
24 talked about that our retention of the GBTC by failing to
25 complete the second step of the contemplated transfer was

1 wrongdoing or somehow unjust.

2 What it was, Your Honor, and I think you've heard
3 this from me, was a breach of contract. But going back to,
4 you know, first-year contracts classes, a breach of contract
5 is not wrongdoing. You can have an efficient breach. You
6 can have a Debtor who, if it were to complete its
7 contractual requirements, would be creating preferences at
8 the expense of its creditor body to whom it owed fiduciary
9 duties more broadly. So, the mere fact that we failed to
10 live up to the contractual requirement to transfer the GBTC
11 does not amount to wrongdoing or unjust conduct.

12 And the final point, Your Honor, a very discrete
13 point on the constructive trust issue, you heard from Mr.
14 Burke, and it is cited in their briefs, the New York Court
15 of Appeals in the Simmons case where they suggested that
16 insolvency and inadequacy of remedies at law made
17 constructive -- made a constructive trust claim available.

18 Obviously, that was a New York Court of Appeals
19 case. It was not decided in the bankruptcy context, and we
20 would ask the Court to look instead at the First Century
21 (indiscernible) Dreier cases that were decided in the
22 bankruptcy context and talk about the particular reluctance
23 to apply constructive trust where there is no inequity in
24 treating all unsecured creditors.

25 THE COURT: So, let me just ask you about that.

1 There was some suggestion that -- we sort of ping-pong back
2 and forth between, well, if we phrase it that way,
3 everything is a constructive trust versus the notion that --
4 whether this sort of -- if you don't agree with Gemini here,
5 then the constructive trust doctrine doesn't serve any
6 purpose, and it can't be that you write it out based on the
7 factors identified by the Debtors.

8 So, it's a big picture point in terms of the
9 purpose of a constructive trust and how you view it and what
10 that means for this case. So, any comment on that?

11 MR. BAREFOOT: I mean, Your Honor, I think you hit
12 the nail on the head when you said -- and we don't disagree
13 with Gemini that it is a flexible test. It is not a rigid
14 test, and the Courts have been clear that not every factor
15 need be clear -- need be clearly present in every case to
16 grant a constructive trust, but the only factor that I think
17 you've really even heard facts alleged about is unjust
18 enrichment, and that alone can't be the basis for a
19 constructive trust claim or there would be no distinction
20 between an unjust enrichment claim and a constructive trust
21 claim.

22 THE COURT: All right. Thank you very much.
23 Anything else?

24 MR. BAREFOOT: No. Thank you for your time, Your
25 Honor.

1 THE COURT: All right.

2 Mr. Shore, briefly?

3 MR. SHORE: Thank you. I'll just be very brief,
4 and I only rise because there seems to be some confusion
5 about my argument, and that's my fault. So, I want to
6 clarify any confusion.

7 MR. SHORE: It's probably just easiest to pull out
8 Section 2, the pledge, which is in Exhibit 1 to the
9 complaint. There's only one pledge, only one instance in
10 which a Debtor granted a property right in part of its
11 property, and it's in Section 2, the pledge, in the August
12 security agreement before the business was shut down.

13 There's three parts to the pledge. When you get -
14 - after the definition of secured obligations. The pledgor
15 hereby pledges, assigns, and grants to the agent for the
16 benefit of the agent and the principal lenders a security
17 interest in all the pledgor's right, title, and interest in
18 and to all property.

19 Now, if it ended there, we'd be having a
20 discussion like we do in cases that that's too vague to
21 grant a security interest in all property, and therefore
22 there's no security interest granted at all.

23 So, obviously, what follows is very important. It
24 says from time to time the contemplation here on its face
25 was that there would be something happening in the future.

1 That's why you have the rep and warranty. If we're going to
2 transfer from time to time in the future, we're going to
3 draw down the rep that we own what we're transferring to
4 you. That explains why you have that definition of
5 collateral. Then it says transferred by or on behalf of the
6 pledgor, and then the third part, to or for the benefit of
7 the agent of the principal lenders.

8 There are two ways to read that language. One is
9 property is going to be moving from the Debtor companies to
10 the creditor or somebody under the creditor's control. My
11 point is, is that makes sense because the way of perfecting
12 here is going to be control.

13 So, we're not giving you a security interest in
14 something that you're not going to be -- ever be able to
15 perfect, because you're not filing a UCC 1. The other way
16 of looking at it is what you're hearing here, which is the
17 secret lien concept.

18 No, the actual lien is going to arise when
19 somebody subjectively believes that an intercompany transfer
20 is ultimately going to move out to the creditor. That's my
21 secret lien point.

22 So, for example, if GBTC -- or sorry, if the trust
23 itself, Grayscale Trust, transfers GBTC to DCG, their
24 argument would be if the intent was that that was ultimately
25 going to be transferred onto the agent, then a lien arises,

1 or security interest arises, or because we've alleged that
2 the intercompany transfer from DCG to GGC was ultimately for
3 the benefit of somebody else, then the security interest
4 arises.

5 And my policy point was when faced between an
6 interpretation of the agreement that says the lien arises
7 when it's leaving the Debtor family and one that says the
8 lien arises when somebody within the corporate family
9 subjectively intends to benefit a creditor, the former
10 should always be taken over the latter because the latter is
11 the secret lien problem, where creditors' rights and
12 creditors' recoveries are going to be determined based upon
13 the subjective views of a transferring party within an
14 inter-corp -- within a corporate family as to why they're
15 making that transfer.

16 So, from our perspective on the face of the
17 document, there is no movement from the corporate Debtor to
18 the creditor, and therefore no lien arises. The only
19 argument with respect to constructive trust is if you read
20 this as giving a lien, then we have the perfection problem.

21 So, if you agree with me that there -- no security
22 interest was granted, I think subjective -- or sorry,
23 constructive trust goes away as well. The problem I have,
24 and I just want to give the Debtors some credit here for
25 their pre-petition activities, for Gemini to say, oh, well,

1 at least the agreement is ambiguous, give me another shot to
2 replead here, this agreement is ambiguous as to whether or
3 not it's the -- it must leave the corporate family or the
4 subjective intent within the corporate family, it would have
5 been -- the wrong act here would have been for the Debtors
6 in a period in which they're collapsing and they've shut
7 down redemptions to then say, I'm not sure what this
8 contract says, whether I -- they have a lien now or they're
9 going to have a lien later. I'm just going to send it out.
10 I'm going to send out hundreds of millions of dollars to
11 GBTC.

12 So, I don't think it's this constant refrain that
13 somehow the Debtors did something wholly inappropriate here
14 by not blowing that GBTC out the door, is just not supported
15 by the allegations in the complaint -- either of the
16 complaints.

17 THE COURT: All right.

18 MR. SHORE: Thank you.

19 THE COURT: Thank you. Anything else from any
20 other party?

21 All right. I'd like to thank all counsel for
22 their arguments today, very helpful. Everything was
23 incredibly well presented, and I understand this is an issue
24 of importance for confirmation, and so I will have a
25 decision before confirmation.

1 I've learned in this job never to promise precise
2 dates, because fate has a sense of humor, but if I'm in a
3 position to let you know anything, I will do that, and in
4 the meantime, we'll just work on a decision. And with that,
5 unless there's anything else, I again thank you all.

6 Oh, I'm reminded, thank you, to request if you
7 would request a copy of the transcript so that's part of the
8 record, and with that, thank you all very much. Have a
9 wonderful afternoon.

10 (Whereupon these proceedings were concluded at
11 3:56 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: January 22, 2024